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## Policy contexts and responses to changes in intimate life

Revised, October 2009

Gendered Citizenship in Multicultural Europe:  
The Impact of Contemporary Women's Movements  
FEMCIT

WORK PACKAGE 6 – INTIMATE CITIZENSHIP

REPORT ON

**POLICY CONTEXTS AND RESPONSES TO CHANGES IN INTIMATE LIFE**

(2008)

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# Introduction

Sasha Roseneil

## ***The FEMCIT Project***

The FEMCIT project aims to provide a new critical, multi-dimensional understanding of contemporary gendered citizenship in the context of a multicultural and changing Europe, and to evaluate the impact of contemporary women's movements on gendered citizenship. Our research focuses on six dimensions of citizenship: political, social, economic, ethnic/religious, bodily/sexual, and intimate citizenship.

Amongst the specific scientific objectives of FEMCIT to which this report contributes are:

- To undertake cross-national and comparative studies, as well as a compilation of national case studies, to explore the multi-dimensional features of gendered political, social and cultural citizenship in Europe
- To assess the current state of women's citizenship in Europe, with particular attention to differences of race/ ethnicity, class, sexuality, religion, region and nationality

The scientific work of FEMCIT is delivered through work packages which address the different dimensions of citizenship.

This report has been produced by Work Package 6 of FEMCIT, which focuses on Intimate Citizenship in Multicultural Europe: women's movements, cultural diversity, personal lives and policy.

## ***The concept of intimate citizenship***

We are using the concept of “intimate citizenship” normatively to refer to “the freedom and ability to construct and live selfhood and close relationships safely, securely and according to personal choice, with respect, recognition and support from state and civil society” (Roseneil, 2008). Intimate citizenship involves rights, responsibilities and capacities – so we are interested in both the rights and responsibilities of intimate partners/ parties, and the (relational-)autonomy of intimate subjects.

For the purposes of this research, we define *intimate/ personal life* primarily in terms of close relationships between adults, both sexual and non-sexual, and the relationship that an individual has with her/himself. We are also concerned, although less centrally, with parent-child relationships (Roseneil, 2008).

The project’s conceptualization of intimate citizenship draws particularly on the work of Ken Plummer (1995; 2001; 2003), who suggests that the concept is “wider and more inclusive” (Plummer, 2003:65) than that of sexual citizenship (as developed, for instance, by Evans, 1993; Weeks, 1998; Bell and Binnie, 2000; Richardson, 2000). According to Plummer, the “intimate citizenship project” looks at “the decisions people have to make over the control (or not) over one’s body, feelings, relationships; access (or not) to representations, relationships, public spaces, etc; and socially grounded choices (or not) about identities, gender experience; erotic experiences” (1995:151).

## ***The focus of WP6***

The focus of WP6 is on transformations in intimate citizenship across Europe in the context of increasing cultural diversity. Social theorists argue that we are living through a period of intense and profound social change in the sphere of intimacy, and identify the post 1960s women’s movement as a key driver of this change (Castells, 1997; Giddens, 1992; Beck and Beck-Gernsheim, 1995). Processes of individualization and de-

traditionalization, and increased self-reflexivity, fundamentally linked to feminist political projects, are seen as opening up new possibilities and expectations in personal relationships, and as radically transforming gender relations and family life. However, Smart and Shipman (2004) and Jamieson (1998) have suggested that social theorists have ignored the uneven impact of these transformations on different minority ethnic populations, with their analysis primarily directed at white, majority ethnic populations.

Over the past thirty years, across European populations as a whole, more and more people are spending longer periods of their lives outside the heterosexual, co-resident nuclear family unit (which became the dominant model during the twentieth century), as a result of the dramatic rise in divorce rates, the increase in the number of births outside marriage, the rise in the proportion of children being brought up by a lone parent, the growing proportion of households that are composed of one person, and the climbing proportion of women who are not having children (Roseneil and Budgeon, 2004). The change in the pace of migrations in Europe, which is producing increasing cultural diversity, is also challenging the hegemony of the modern western European nuclear family, as different models of intimate and family life prevail in different ethnic groups (e.g. Reynolds, 2000; Mand, 2006a and b). As a result of all of these changes, the heterosexual couple, and particularly the married, co-resident heterosexual couple with children, no longer occupies the centre-ground of European society, and cannot be taken for granted as its basic unit (Roseneil, 2000, 2002). The male-breadwinner/ female-homemaker model on which post second war citizenship was based is, therefore, no longer applicable (Roseneil and Budgeon, 2004; Roseneil, 2006), and new conceptualizations of “intimate citizenship” (Plummer, 1995; 2001; 2003) and new welfare settlements are being constructed to respond to the increasing diversity and non-conventionality of the intimate lives of European citizens. These transformations have major implications for the EU in relation to future welfare policies, the legal regulation of personal life, “care regimes” and the labour market.

Whilst theorists have linked the transformation of intimate life to the impact of women's movements, there is very little empirical research which systematically examines the lived experience of intimacy in the wake of the cultural gender revolutions unleashed by second wave feminism.<sup>1</sup> In particular, there is no comparative research which focuses on differences and similarities between European nation-states in this regard. It is clear from existing census and survey data that changes in the organization of personal life are not uniform across Europe, and are inflected by national and regional cultures, and vary between religious, ethnic and "lifestyle" groups. We also know that women's movements in different European states have quite different histories, trajectories, demands and levels of policy and political impact (Christensen, Halsaa and Saarinen, 2004). The specificity of experiences of those from minority cultural and religious backgrounds have not been subjected to systematic investigation.

## **Objectives of WP6**

1. To investigate across four contrasting European nation-states the experiences of transformation in intimate life of those most distanced from the male-breadwinner model i.e. those living outside conventional families
2. To analyze the relationship between the transformation of intimate life and the demands and actions of movements for gender and sexual equality and change;
3. To examine cultural diversity in relation to the transformation of intimate life, with reference to religion, "race"/ ethnicity, lifestyle, sexuality, nation and region
4. To analyze the historical, cultural and policy background of transformations in intimate life in four contrasting European nation-states
5. To develop an analysis of the implications of these transformations for social policy in the EU, with recommendations for policy makers and legislators

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<sup>1</sup> One project which does this is the UK based ESRC Research Group for the Study of Care, Values and the Future of Welfare ([www.leeds.ac.uk/cava](http://www.leeds.ac.uk/cava)). Roseneil was one of the grantholders of this project.

## Research Design and Methods

The project has a multi-disciplinary three-stranded approach to the understanding of the transformation of intimate citizenship, focusing on its cultural, policy and socio-biographical dimensions, and encompassing both a “top down” and a “bottom up” approach to social change. Each strand of the research is being conducted according to the same methodology in each of the four national contexts:

### Strand 1: Changing cultural discourses about intimate life (objectives 2, 3)

An historical survey of women’s movement demands and actions in relation to intimate life, and of other social movements’ and NGOs’ demands, actions and responses (e.g. black/ minority ethnic/ anti-racist, men’s, disability, lesbian and gay, pro-family), to map the main shifts in discourses about intimate life

### Strand 2: Policy contexts and responses to changes in intimate life (objective 5)

1. A comparative policy analysis of how national social policies are being re-framed (or not) in response to changes in intimate life (towards objective 4)
2. European and national level policy recommendations on the basis of the findings of Strand 3 below

### Strand 3: Intimate lives at the cutting edge of change (objectives 1, 2 and 3)

A qualitative study of intimate life using the biographical-narrative interview method, and focusing on those whose lives might be expected to have been most affected by the cultural shifts set in train by the women’s movement - those living outside conventional familial relations. The sample includes men and women, all of whom are one or more of the following: unpartnered (single); in a non-cohabiting relationship (“living apart together”); lesbian or gay; living in shared/ communal housing. Ethnic diversity within the sample will be ensured – at least half of interviewees will be from minority ethnic communities. 16 interviews are being carried out in each country.

### National Research Sites

The research is being conducted out in four contrasting national contexts which differ in terms of contemporary and historical welfare and gender regimes, state/ market relationship, dominant and minority religions and ethnic groups and patterns of im/migration. The four chosen national contexts are Bulgaria, Norway, Portugal and the UK. This provides a former state socialist country, a Nordic “woman-friendly” (Hernes, 1987) welfare state, a southern European country, which has relatively recently transitioned from dictatorship to democracy, and a north-western European liberal democratic welfare state.

### ***Policy Contexts and Responses to Changes in Intimate Life***

This report is the first output from Strand 2 of WP6. It provides a detailed account of the contemporary policy and legal landscape in the four chosen national contexts (Bulgaria, Norway, Portugal and the UK) in relation to intimate citizenship. It gives an overview of the ways in which policy and law relating to intimate citizenship have changed historically, for a range of reasons, which sometimes include responding to changes in intimate life. It also offers a number of case studies and commentaries on significant aspects of law and policy relating to intimate citizenship, and on key debates and areas of contestation in relation to intimate citizenship. Many of these will be taken up and further explored in forthcoming publications from Strand 2.

The report draws on national government documents, legislation and legal codes, policy documents, reports and parliamentary debates, NGO reports and documents, media reports and debates, and scholarly publications, primarily in the fields of social policy, law, history and sociology.

## Central issues of concern

In carrying out the research for this report, we were driven by consideration of the following questions. These questions are not all directly answered in this report, but are to be explored in subsequent publications.

- What assumptions are there in social policies and law about the nature of a proper intimate relationship and what a “family” is?
- How does the state intervene in defining the parameters of a good intimate relationship?
- How pervasive is the legal and policy privileging of marriage? To what extent does marriage remain the “gold standard” intimate relationship?
- To what extent does social policy individualize or “familialize” recipients of benefits (cf Nancy Fraser, 1989)?
- To what extent does an assumption of heterosexuality underpin social policy and law, and therefore intimate citizenship?
- To what extent is it assumed that “family” life involves procreation?
- To what extent do social policies and law recognize/ stigmatize difference and diversity in intimate and family life?
- To what extent does intimate citizenship policy address itself to individuals or to units, and what units are addressed by policy (the couple, the married couple, the family, the household)?
- To what extent is marriage still privileged?
- To what extent is policy (primarily or significantly) child-orientated?
- What is the meaning of “family” that emerges from law and policy in each country?

## **Key Areas of Intimate Citizenship Policy and Law**

This report addresses twelve substantive areas of intimate citizenship policy and law, as follows:

### **Marriage**

- What is the legal definition of marriage? Does the constitution define marriage/ grant it a particular role?
- At what age can people get married?
- What obstacles are there to marriage? (What can stop people being allowed to marry?)
- Civil versus religious marriage? Where and how do people get married?
- What are the fiscal benefits and privileges of marriage – e.g. tax (is there a married couples' tax allowance?), social security and unemployment benefits, pensions and survivors benefits, carers' allowances, inheritance rights?
- What are the social benefits and privileges of marriage – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals etc?
- Is rape in marriage a crime?
- What is the law (if any) regarding domestic violence, and what policy initiatives are there to combat it?
- To what extent are the two parties to a marriage treated as a couple/ unit, and to what extent are they treated as individuals?
- Is there legislation/ public debate about forced marriages?
- Is there legislation/ debate about incest?
- What is the status of pre-nuptial agreements? Is there an issue about "assets regime" to be decided prior to marriage?

### **Divorce**

- What is the law on divorce – grounds for divorce etc?



- What is the history of divorce legislation? When did it become first available? Do the major religious groups actively oppose divorce?
- What happens to property and pensions on divorce?
- How are decisions about children made after divorce, and what principles apply concerning residence/ custody etc?

### **Non-marital heterosexual relationships**

- Is there law governing heterosexual cohabitation/ de facto relationships?
- What are the rights and responsibilities of heterosexual cohabitants/ de facto partners?
- Are there fiscal benefits and privileges for cohabitants/ de facto partners— e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers' allowances, inheritance rights?
- Are there social benefits and privileges for cohabitants/ de facto partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?
- How different from marriage are non-marital heterosexual relationships in terms of fiscal benefits and social benefits?
- What is the law (if any) regarding domestic violence, and what are the policy initiatives to combat it?
- To what extent are the two parties to a cohabitation/ de facto union treated as a couple/ unit, and to what extent are they treated as individuals?

### **The Regulation of Sexual Practice**

- Has homosexuality and lesbian sexuality been criminalized? What was illegal? What is the history of decriminalization?
- What is the age of consent (hetero/ homo)?
- Is incest illegal? What is its definition?
- What is state policy around sex education in school?
- What is the law concerning prostitution – is it legal/ tolerated/ illegal? Who is

- prosecuted (the prostitute or the purchaser of sex)?
- Is there a public debate about prostitution, and if so, what are its parameters?
- Is there policy around trafficked women?

### **Same-Sex Partnerships**

- What is the age of consent?
- What is the history around the age of consent?
- Is there provision for the recognition of same-sex partnerships (or are same-sex partners “legal strangers”)?
- If so, what is it called – and has there been a debate about whether it should be “marriage” or not? Outline the parameters of the debate in parliament, and in the media, and who the key players were/ are, including religious groups, if applicable.
- If there is recognition, what does it entail? Rights and responsibilities?
- Are there fiscal benefits and privileges for registered same-sex partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers’ allowances, inheritance rights?
- Are there social benefits and privileges for registered same-sex partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?
- Is there recognition of same-sex domestic violence, and are there policy initiatives to combat it?
- Which terms were/are used to describe homosexuality in the law?

### **Parenting and Reproduction**

- How are mothers/ parents supported financially and socially by the state? (tax allowances, maternity leave, parental leave for fathers/ partners, for care of older children, child benefit, child care provision).
- What is the law about registering the birth of a child, and its parents? Who is the father (biological father versus partner of mother etc)? How important is

biological versus social parenting, and has there been a debate about this?

- What is the law concerning abortion? Give a brief history.
- Is there policy/ public debate around teenage pregnancy?
- Is there policy/ public debate around delayed motherhood?
- Is there policy/ legislation defining an ‘appropriate’ age for motherhood?
- How is adoption and fostering regulated? (by the state or private agencies?)
- Who can adopt (married couples, single women/ men, cohabiting couples, same-sex couples)? Is there adoption leave?
- Does the state provide access to assisted conception (donor insemination, IVF etc)?
- If so, for whom (married couples, single women, cohabiting heterosexual couples, lesbian couples)?
- Is there legal regulation of private provision of assisted conception? If so, what is the nature of the regulation?
- What is the law concerning surrogacy?

### **Homosexuality and Anti-Discrimination Legislation**

- Is there law against discrimination on the grounds of sexuality/ against lesbians and gay men?
- What is the history of the legislation, and its provisions? (e.g. does it relate to employment, the provision of goods and services etc?)
- Is there recognition of the problem of anti-gay violence/ hate crimes? Are there policy initiatives to combat it?

### **Immigration and Intimate Relationships**

- Is there a right to “family reunion”?
- What is the law/ policy about immigration for the purposes of marriage?
- Do unmarried and same-sex couples have the right for the non-national partner to immigrate?

### **Single People and Solo Living**

- Is there any public/ policy debate about the rise in solo living?
- Is there any social/ public housing provision for single people?

### **(Trans)gender Recognition**

- What is the legal situation regarding trans people? Is there provision to register a person's "new gender", for instance, by changing birth certificates and passports? What is required (i.e. surgery?) to achieve recognition of "new gender"?
- What body/ institution has the authority to deal with transgender issues?
- Is there anti-discrimination legislation regarding trans people?
- Does the health service provide gender reassignment surgery? Is it free? How is it accessed?
- Is there a law regulating the act of naming? To what extent are names gendered? Are there restrictions to the names accessible to transgender people based on gender?

### **Care**

- Is there any policy/ public debate about care, particularly the "care deficit"?
- What rights, if any, do people have for (paid or unpaid) leave from work to care for children, partners, family members/ elderly parents, friends?

### **Tissue and Organ Donation**

- Are there restrictions on who can donate bodily tissue and organs to whom? (i.e. family members)

### **Authorship of the Report**

The work package leader and principal investigator of WP6 is Sasha Roseneil, who also authored the Introduction. The country reports were researched as follows: Bulgaria – Mariya Stoilova; Portugal – Ana Cristina Santos; Norway – Tone Hellesund; United Kingdom – Isabel Crowhurst.

# 1. Bulgaria

Mariya Stoilova

In terms of policy, but also in the wider official discourse of intimacy, such as academia, media, etc. ‘proper’ relationships in Bulgaria would be those bound by marriage.

Nevertheless, there is wide recognition that many intimate practices go beyond the marital union and family is increasingly being linked to shared responsibilities, care and friendship, upbringing of children. The voluntarism, gender equality, independence and mutual respect would be the key characteristics of family relationship. Very often family rights and responsibilities are linked to marriage as much as to blood ties, which makes them more of communal/ kin type of relationship. Nevertheless, the root of family is primarily focused on heterosexuality, without any recognition of relationships outside of this domain. The non-hetero relations of intimacy are often silenced and unspoken of, but when they are discussed it is often in negative terms or as something exotic and rare.

There is growing awareness that the present legislative framework needs to be ‘updated’ so that it would correspond to the present developments in the sphere of intimacy. At present a new Family Code is under discussion by the different parliamentary commissions. The most significant aspects of the proposed changes are legal recognition of de facto cohabiting, for the first time in the legislation, introduction of new forms of marital property regime, relaxation of the divorce legislation, and making adoption procedures more flexible. These changes focus on rights and responsibilities related to children and property, giving much more important role of negotiations between the partners, social counselling and mediation, rights and preferences of children. Non-hetero relations are not likely to receive any recognition at present and are hardly discussed outside LGBT NGOs.

The policy is primarily child-oriented and this includes not only benefits but also the formulation of policies and legislation, where the protection of children’s interests is at the

centre. Encouraging people to have children and supporting their upbringing is one of the main directions of the state policy due to population decline.

As it was mentioned above, the Bulgarian social policy and law are pervasively heteronormative. Policy and legislation are usually based on the expectation of heterosexual relations, and when the de-jure situation does not exclude same-sex partnerships, the actual implementation often involves personal judgements of civil servants, and therefore is very susceptible to indirect discrimination of non-hetero practices.

## **1.1. Marriage**

### **1.1.1. What is the legal definition of marriage? Does the constitution define marriage/ grant it a particular role?**

At present, there are two main documents that legally define marriage – the Constitution and the Family Code. There have been four Bulgarian Constitutions (1879 1947, 1971 and 1991). The definition of marriage is introduced for the first time in the 1947 Constitution adopted by the Communist Party, in Article 76 of the main rights and obligations of the Bulgarian citizens. According to this article ‘marriage and family are under the protection of the state’. Civil marriage is identified as the only one having legal status. In spite of this children born within or outside marriage are granted equal rights. The following Constitution (1971) uses the same definitions but also expands on the marital and family relationships in Art.38 where it is stated that the spouses have equal rights and obligations in marriage and family, and also that ‘parents have the right and the obligation to take care of the upbringing of their children and for their education’.

The present Constitution, which was adopted after the fall of the state socialist government (1991), gives more detailed and far-reaching definition of marriage. Marriage is described for the first time as a ‘voluntary union between a man and a woman’ (Art. 46: 1). The upbringing and education of children is again defined as a right and obligation of parents, but here it is explicitly mentioned that this is until the children reach adulthood and also that parents are supported by the state (Art. 47: 1). Children born within or out of wedlock have the same rights (Art. 47:3), and children who are left without the care of their close ones are under the special care of the state and society (Art. 47: 4). This is the first Constitution which includes a text on limiting or deprivation of parental rights (Art. 47: 5).

The Family Code (since 1985, last amendment July 2007) governs relations based on marriage, kinship and adoption, full legal guardianship and trusteeship. The main principles of the regulation of family relations are: the protection of family and marriage by the State and society; equality of rights of husband and wife; voluntary nature and durability of the bonds of marriage as the foundation of the family; comprehensive protection of children; equality of the rights of children born in and out of wedlock and adopted children; respect for the individual; care and assistance between the members of the family (Art.3).

The Family Code also identifies the main functions of family as: ‘birth, bringing up, and educating children; providing opportunities for development of the abilities of all family members, as well as of conditions for executing of labour and social obligations; creating relations in the family based on respect, adherence, friendship, common effort and mutual responsibility for its development; taking care and morally and financially supporting of the elderly, sick and labour-incapable members of the family’ (Art. 4).

In the section of the Code entitled ‘Protection of the family’, it is declared that the state and society provide conditions for the development of the family, encourage birth, protect and stimulate motherhood and help parents in raising and educating children. ‘They also make efforts for the preparation of young people for marital life’ (Art. 5).

The Family Code has a section regulating the relations between the spouses, which are based on equality within marriage (equal rights and obligations, Art. 14), reciprocity (‘mutual respect, common care of the family, understanding and faithfulness’ , Art.15), living together (unless there are important reasons for the opposite (Art.16), and freedom of choice of profession.

The family had a special role during socialism. According to the Record of Proceedings Number 527 from the session of Politburo of the Central Committee of the Bulgarian Communist Party (27.11.1979) it is ‘the main obligation of the family to prepare and



educate complete socialist citizens' (Art. 65: 2). According to the same document youth, or people between 14 and 30 years of age, are obliged to create stable and complete families (Art.66), and are also obliged to show respect for their parents and the elderly (Art.69)

#### **Comment**

Interestingly, family and marriage are mentioned separately quite often in these pieces of legislation, which might be seen as a recognition that these two circumstances do not overlap. This also relates to the overall representation of family in policy and legislation as something that is not exhausted by marriage and parent-child relationships. Very often family rights and responsibilities are equally linked to marriage and blood ties, where (grand)parents and siblings are included. This makes family relationships more of a communal/ kin type.

The first time when the state intervened in the regulation of marital and divorce practices was in 1945 when a Decree on Marriage (1945, SG 108/12.05.1945) was adopted (Doncheva, 2002). According to Doncheva (2002) the new legislation separated religion from family relations and, more importantly, a universal judicial regime was introduced for all Bulgarian citizens. Prior to the existence of this family legislation, marriage, divorce and other family relations were regulated by the Ecclesiastical Code of the Bulgarian Orthodox Church or by the corresponding documents of the Muslim, Jewish and other religious communities and generally the state was not involved in these matters as they were considered primarily of the competence of the church.

#### **1.1.2. At What Age Can People Get Married? What obstacles are there to marriage?**

The Family Code defines four obstacles preventing people from getting married: the existence of a previous marriage; blood ties; age; mental or physical diseases dangerous for the other spouse and/ or for the children. The first two are absolute obstacles, and no

alterations are possible. People who are already married cannot marry a second person. Marriage is also prohibited between relatives of a direct line of descent, between brothers and sisters, their children and other relatives of a collateral line of descent up to the fourth degree included, and between persons for whom adoption creates a relationship of a direct line of descent or of brothers and sisters (Art.13:2).

Age is the area where some flexibility is possible. The legal age of marriage is 18 years (Family Code, 2007, Art.12:1) and it is equal for both genders. However, under special circumstances people aged 16 and 17 can get married. The meaning of ‘special circumstances’ is not legally defined; it depends on the personal judgement of the president of the regional court. In this case the under-aged person needs to submit a declaration at the place of residence and permission from the president of the regional court is required. The parents/ guardians are asked for their opinion, but their agreement does not give permission. Only the president of the regional court has the power to allow or decline the marriage. From what I have been able to find out from the judicial discussion forum Lex.bg, most often special circumstances are related to immigration or expecting a child. Upon contracting a marriage a minor acquires legal capacity, but can dispose of property only with the consent of the regional court in his or her place of residence.

In order to enter into a civil marriage each of the partners has to submit a declaration that there are not any prohibitions for the marriage and to provide a medical certificate that they are not affected by any of the ailments stated by the law. These ailments include a mental disease or imbecilities which are sufficient reasons to place the person under full interdiction. In this case no marriage is possible. A disease representing a serious threat to the life and health of the future generations or the other spouse is also an obstacle to marriage. In this situation, if the ailment is dangerous only for the other spouse and he or she is aware of this (Art.13:1: 2, 3) and certifies this in writing, marriage can be allowed. However, if the disease is dangerous for the health and life of the children the marriage is not possible, this is an absolute obstacle. This is seen as ‘protection of the public interest

and guarantee for healthy offspring' (Doncheva, 2002: no page, my translation).

The list of the diseases is announced by the Ministry of Health, and according to Instruction No1 for the procedures for Medical Certificates for Entering into Matrimony (SG 75/27.09.1985, last amendment in 1991) diseases in case of which marriage is forbidden are: firstly, congenital or acquired imbecility; and secondly, diseases dangerous for the offspring, such as: hereditary diseases with serious danger to the offspring; and syphilis, except the seroresistent syphilis. The list of diseases when marriage is possible with the consent of the spouse-to-be because they are not dangerous for the health of the children includes: 1. seroresistent syphilis; 2. gonorrhoea; 3. Leprosy; 5. tuberculosis; 6. AIDS.

AIDS was introduced as an obstacle in 1987 (SG/59) but in practice is not included in the obligatory tests performed by hospitals, where only Wassermann tests are carried out. The information that AIDS tests are not necessary in order to enter marriage was confirmed when I contacted the National Committee on AIDS and Sexually Transmitted Infections Prevention at the Council of Ministers, the Bulgarian Association for Family Planning and Sexual Health, and a private hospital issuing medical certificates for marriage. The fact that AIDS is not included can be explained with the fact that officially it is not among the diseases considered to be dangerous for the offspring, which allows the expenses for the tests to be reduced.

These obstacles to marriage have varied over time. For example, prior to the existence of the Decree on Marriage (1945, SG 108/12.05.1945), the Ecclesiastical Code of the Bulgarian Orthodox Church (1895) regulated marriages, according to which people had to: have the permission of their parents; not be related; not be married to somebody else; not be mentally ill or epileptic; not be convicted to celibacy; be baptised; and declare agreement to marry. According to the same document, the legal age for marriage was 19 years for men and 17 for women, which was reduced, as the previous requirements (prior

to 1895) were 20 years for men and 18 for women.

### **Comment**

There are several interesting issues here. Firstly, the minimal age of marriage is different for men and women, but is equalised later. I am assuming that this has happened after the socialist government came into power. I have not been able to find the earliest pieces of legislation regulating this: Decree on Marriage (1945) and the Law on Persons and Family (SG 182/9.08.1949), but in the Family Code from 1968 (SG 23/22.03.1968) the minimal age for marriage is already equal for men and women – 18 years, or 16 for special circumstances. Secondly, physical illness (except epilepsy) is initially not considered an obstacle, only mental illness. Again it could have been implemented as early as 1945 but I could only find documents from 1968. And thirdly, the requirement for agreement to enter marriage can be interpreted as a regulation against forced marriages; the marital unit is seen as voluntary. It is difficult to argue that there were corresponding requirements in the other religious communities as I have not been able to find any documents. Nevertheless, the principle of voluntarism is used in the legislation later for example in the Family Code (1968, Art.3).

### **1.1.3. Civil versus religious marriage? Where and how do people get married?**

Religious ceremonies were accepted until 1945, after which they were allowed only after a civil marriage (Decree on Marriage, 1945: Art.2). At present there are regulations in the Constitution (Art. 46: 1) and in the Family Code (Art. 6) that give legal status only to civil marriages. No other ceremonies, including religious ceremonies are legally binding. The Penal code used to make it a criminal offence for a priest to carry out a religious marital ceremony without civil marriage (Doncheva, 2002). There are no statistics on how many religious marriages there are annually.

The requirements for and obstacles to an Orthodox religious marriage are different from the civil one. Couples who want to have a religious marital ceremony need to present a civil marriage certificate prior to the ceremony, and to sign a declaration that they are Orthodox Christians, that they have not been married more than three times, and that they are not related in any of the following ways: blood relations of direct decent; blood relations of collateral line of descent up to the fifth degree included; relations through marriage up to the third degree, or fourth only in the cases when two brothers are marrying two sisters, or a brother and a sister getting married to a sister and a brother; relations through christening up to first degree and second only in the cases when godparents marry the parents of their godchildren.

Marriage is also prohibited between: relatives of a direct line of descent; brothers and sisters, their children and other relatives of a collateral line of descent up to the fourth degree included; persons between whom adoption creates a relationship of a direct line of descent and of brothers and sisters (Art.13:2).

The civil marriage is contracted when a men and a woman give their consent personally and simultaneously before the officer for civil status (Family Code, Art.7). The marriage can take place not earlier that 30 days after the declaration submission, unless there are important reasons for an earlier marriage (Art.10: 1). The possible reasons are not legally defined.

**1.1.4. What are the fiscal benefits and privileges of marriage – e.g. tax (is there a married couples' tax allowance?), social security and unemployment benefits, pensions and survivors benefits, carers' allowances, inheritance rights?**

There are fiscal benefits for temporary employment incapacity due to taking care of an ill or placed under quarantine family member, as well as for accompanying a family member for necessary medical consultation, tests or treatment (10 days per year if the

family member is over the age of 18, and 60 days if it is a child aged 18 or under). These benefits can be paid to any family member (it is not necessary to be the mother) but family members are understood to be: 'the husband, the wife and their lineal ascendants and descendants' (Social Insurance Code, Article 11: 4). Children are considered to belong to the same family if they are under the age of 18 or 26 if they are still in education and regardless of age if they are impaired.

In case of death of the socially insured person his/her spouse, children and parents are entitled to a lump-sum payment equal to 2 minimal monthly wages and to hereditary pension (Social Insurance Code). The children are entitled to the hereditary pension until they are 18 years old, or until they are in education but not longer than 26 years of age, or to 26 if they have disability. The spouse is entitled to hereditary pension 5 years before s/he can retire, or before that if s/he has working incapacity. The widow/ widower will lose the hereditary pension if s/he remarries (Article 96: 3).

The right to support is legitimised by the Family Code. According to it a person who is unfit to work and cannot support her/himself from his property is entitled to support (Art. 79). The support has to be furnished from the following persons in the same sequence: children, spouse or a former spouse; parents; to grandchildren and great-grandchildren; to brothers and sisters; to grand-father and grand-mother, and to ancestors of a higher degree.

Marriage gives serious privileges to spouses and children in relation to inheritance rights. Only married couples are entitled to inherit from each other. There is the so called 'reserved share' of the inheritance which belongs to the spouse, children (biological, adopted and 'recognised') and parents of the person. Even if there is a will it cannot deprive these heirs from a share. Children from all marriages have equal right to inheritance, but children born outside wedlock can inherit only half of what children from the marriage inherit and this is only under the condition that the father has officially 'recognised' the child in front of the authorities (Inheritance Law, Art. 21 and 29).

Marriage gives rights in relation to property. All properties acquired during the marriage as a result of the common contributions belong to both spouses. The contribution is explicitly defined as ‘the investment of means and labour, by care for the children and work in the household’ (Art.19: 2). The two spouses get equal shares of the matrimonial community property on the termination of the marriage.

**1.1.5. What are the social benefits and privileges of marriage – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals etc?**

Some benefits of being married relate to the social insurance status of a person, who can be entitled not to pay taxes without losing their benefits entitlements. For example, a person is insured without paying benefits if: s/he is taking care of a spouse or (adopted) child with 1<sup>st</sup> group disability<sup>2</sup> (Social Security Code).

There are some privileges that the Labour Code gives to people having marital or blood relationships, and to which non-married couples are not entitled. For example, employees are entitled to two days time off work in case of death of a parent, child, spouse, brother, sister or parents of the spouse, or other relatives in direct line of descent (Art. 157: 1). All these categories exclude cohabiting couples and same-sex couples as such. The same applies to taking time off in relation to sickness of family members (Art. 126), where family is not defined but is more likely to include people bound by marriage.

The Health Law (since 2005; last amendment SG/41/2007) grants additional rights to marriage and also to blood ties: in the case of death in hospital, a relative of the person has to be notified. These are: parent, adult child, spouse, brother or sister (The Health

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<sup>2</sup> The degrees of impairment are defined according to the decreased ability to work and the need of assistance for everyday routines. The 1<sup>st</sup> degree is decreased ability with more than 90%, the 2<sup>nd</sup>: 71-90%, and 3<sup>rd</sup> – 50- 70% decreased ability (Ministry of Labour and Social Policy. No date. *In Help of People with Impairments*, Available from the World Wide Web at: [http://www.mlsp.government.bg/bg/public/disable\\_brochure.htm](http://www.mlsp.government.bg/bg/public/disable_brochure.htm) [accessed on 11.12.07]

Law, Art. 98). If a person dies in a medical institution the same people have to be informed before the autopsy can take place (Art.98). The formulation ‘kin’ of the patient is used in this law, but the meaning of it is not explicitly explained. According to the ‘predecessor’ of this law (People’s Health Law, in power until 2005), kin is ‘a spouse, parents, direct blood relatives, brothers or sisters’. Again spouse or blood relatives can make the decisions about non-hospital treatment of the patient in the cases when the agreement of the patient cannot be taken (Contract for Primary Non-Hospital Help, 2005).

In the case of serious illness the spouse and relatives of the patient have the right to receive information, unless the patient has given a written request of the opposite (Art. 48: 1). However, these regulations can be avoided because the patient can request other people to receive information about the treatment (Art. 50: 2) and these people are not limited by the groups mentioned above. The patient can give the names of any close person or relative who has to be informed if his/ her condition gets worse. The same person/ people have the right to visit the patient outside visiting hours (Art. 82: 2: 4). The difference consists in the right of the spouse/ relative to receive information, which is not given to other close people, for example intimate partners or friends, unless requested by the patient.

In the case when the patient is a child, decisions are made by the parent, guardian or adopting parent. In this case a same-sex partner is not allowed to make any decisions on behalf of their partner’s child. The situation is not the same for non-married heterosexual couples because the legislation allows the father to recognise the child as his own and to have the same parental rights and obligations as when the child is born within wedlock. Marriage can also be a reason for removal of sanctions for some sexual acts that are criminalised by the Penal Code. According to Art.158 if marriage between the defendant and the victim occurs, the punishment will not be carried out. This relates to the following criminal acts: firstly, acts with a person who has not accomplished 14 years of age aimed at arousing or satisfying sexual desire with or without copulation, with or



without the use of force, threat, helpless status; secondly, acts with a person who has reached 14 years when does not understand the character or the importance of the act; and thirdly, copulation with a female person by the use of force, or material and employment dependence. If marriage between the victim and the defendant occurs before the end of the court proceedings, the case will be closed.

In cases of imprisonment there are some rights that married couples and blood relatives have which cohabiting partners do not. According to the Regulation of the Implementation of the Law on Administering Punishments the imprisoned person has the right to make telephone calls only to his spouse, children, parents or siblings (Art.37). There is a limit of up to four visitors at a time, but this is not in power for spouses, children, parents and siblings. If the same relatives are imprisoned at the same time they are entitled to visits (Art.36). Correspondence between the prisoner and the relatives mentioned above cannot be forbidden (Art.38).

#### **1.1.6. Is rape in marriage a crime?**

The Bulgarian Penal Code does not specify the marital status, therefore rape within marriage is considered a crime in the same way as rapes outside wedlock. However, there is one serious omission in the Penal Code related to the fact that the gender status of the person being raped is explicitly identified as 'female'. According to the text of the code only a woman can be raped (Art. 152), and a man cannot. At the same time the gender of the person committing the crime is not specified: 'whoever copulates with a female person'. The punishment for rape is more rigorous if the woman is under 18 years of age (even more if under 14); if she is of descending kin; if the rape was committed by more than one person; if an average bodily harm has been caused; if a suicide attempt followed; (New, SG 92/02) if the act has been committed for the purpose of engagement in subsequent lewd activities or prostitution (Art. 152).

The texts mentioned above have remained after several amendments were made in 2006 to replace regulations of acts against a 'female person' with 'any person'. For example, the copulation with any person (previously a female person) by force through using material or employment dependence (Art. 153); abducting a (previously female) person for the purpose of debauchery (Art. 156). The motivation for changes, as mentioned in the proposal for the amendments, was to grant equal protection of both men and women from sexual violence, which is required by the Constitution and to equalise the national legislation and the UN requirements in the Convention against Transnational crime. As part of the same changes the punishment for sexual acts with children, the selling of children, and trade with human organs have been increased.

#### **1.1.7. What is the law (if any) regarding domestic violence, and what policy initiatives are there to combat it?**

A new Law on Protection against Domestic Violence was adopted in 2005. This law governs the rights of individuals who have suffered from domestic violence, the protection measures, and the procedures for dealing with domestic violence. According to the law domestic violence is 'any act of physical, mental or sexual violence, and any attempted such violence, as well as the forcible restriction of individual freedom and of privacy', carried out against individuals who have or have had family or kinship ties or cohabit or dwell in the same home (Art.2). People can seek protection under this law if they have suffered violence from: a spouse or ex-spouse; a person with whom they are or have been in a de-facto union; a person with whom they have a child; relatives by ascending or descending line; brother or sister; relative by-marriage up to 2<sup>nd</sup> degree; guardian, trustee or foster parent. The procedure can be initiated by the victim, by the Executive Director of the Agency for Social Assistance or, in the cases of urgent protection, by siblings of the victim or other relatives of direct descent.

According to the Bulgarian Helsinki Committee (2007) the most important gap in the Law for Protection against Domestic Violence is that it does not provide for the

criminalisation of violation of court orders, which are protective measures for the victim. According to the report, there are violations of court orders in 50% of cases. Other shortcomings of the Law pointed out by the Bulgarian Helsinki Committee that lead to inefficiency are the provisions for collection of numerous pieces of evidence, and the belittling of urgent court protection.

Genoveva Tisheva (2005, p 1-2), Managing Director of the Bulgarian Gender Research Foundation, describes the law as ‘a real breakthrough’ and ‘a great victory for Bulgarian women and women’s NGOs’. According to her, previously it was not recognised that violence against women is a serious public problem that needs to be regulated.

There are two main policy initiatives in relation to domestic violence: National Action Plan on Gender Equality 2005-2006, which has a section on domestic violence, and the Programme for Prevention and Protection against Domestic Violence (2006). It is written in the Programme that:

The findings of the research showing that domestic violence is an unchanging part of the life of Bulgarians and it has a very serious presence in their life and in the environment of relatives and friends are very disturbing (Programme for Prevention and Protection against Domestic Violence, 2006: 1, my translation).

The Open Society Institute (2006) provides more detailed information on the implementation of the Program for Prevention and Protection against Domestic Violence: the aim each regional centre town to have a helter for victims of domestic violence has not been accomplished yet; there are 16 telephone hotlines operated by women’s NGOs, none of them free; two crisis centers have been established; and there is no program available for men with aggressive behavior who perpetrated domestic violence.

Recently, the Bulgarian parliament hosted a regional meeting as part of the initiative ‘Parliaments in Struggle against Domestic Violence against Women’ (29<sup>th</sup> of November 2007). According to the results presented at this meeting there were 282 court cases in

Sofia in 2006 under the law on domestic violence. The court procedures of 93 of them were stopped, most of them due to withdrawal of the claims. Until November 2007 there were 316 court cases, 91 terminated, again predominantly due to withdrawal of the claims.

The Ministry of Internal Affairs carried out a representative national study on the issue of domestic violence. According to the findings 49.2% of the interviewed people think that domestic violence is a personal problem, and not a social issue. Men are more inclined than women to see domestic violence as a personal issue. From the interviewees: 40% personally know somebody who has been a victim of physical violence in the family; 37.2% knew a victim of physical violence; 12.8% knew a victim of sexual violence. However, only 5.5% admit that they have been a victim of physical violence of their partner and another 5% did not want to answer this question.

#### **1.1.8. To what extent are the two parties to a marriage treated as a couple/ unit, and to what extent are they treated as individuals?**

There is tendency to a mixed approach towards marriage – on some occasions the spouses are treated as individuals (for example in relation to taxes), but in others they are a unit (for example, regarding marital property). However, it seems that in most occasions spouses are seen as individuals. According to the Family Code, all property acquired during the marriage as a result of the common contributions belongs to both spouses. For example, the money from a savings account that has been opened during the marriage belongs to both spouses regardless in which name the account is. In this case the spouses are a unit. Upon divorce the two spouses get equal shares of the matrimonial community property with the termination of the marriage. A larger share might be assigned by the court to the spouse who will take care of the underage children if this imposes on him or her serious hardship, or to one of the spouses if his or her contribution to its acquisition is considerably larger than that of the other spouse.

Simultaneously, during the marriage both spouses can have individual property, which does not belong to the other spouse. These are assets acquired before the marriage, or after the marriage due to heritage or donation. The individual property also consists of personal (movable) property used for ordinary personal needs or for a legally practiced profession. In relation to taxation, the two parties to a marriage are treated as individuals; there are no joined tax returns in Bulgaria.

#### **1.1.9. Is there legislation/ public debate about forced marriages?**

As it was mentioned earlier, there is a long tradition of considering marriage to be a voluntary union. Voluntarism was part of the requirements for marriage of the Bulgarian Orthodox Church as early as 1883. It is possible that other religious minorities have had other traditions, but they have not become part of the legislation.

At present the Penal Code (last amendment SG 102/19.12.2006) has a section on crimes against marriage and the family which criminalizes the act of compelling somebody by violent means to enter matrimony or to abduct a female (but not a male) person with the purpose of compelling her to enter matrimony (Art. 177: 1 and 2). The code prohibits the giving or receiving of ransom for permission to enter marriage (Art. 178) and also polygyny (Art. 179). I have not been able to see when these regulations became part of the legislation, but they definitely existed during socialism because some amendments were made in 1982. Therefore, it can be argued that these regulations are not influenced by EU policy debates on forced marriage. There is little attention paid to forced marriages in recent public debates.

### **1.1.10. What is the status of pre-nuptial agreements? Is there an issue about 'assets regime' to be decided prior to marriage?**

A proposal for changes to the Family Code has been made recently (November, 2007) by the National Movement for Stability and Progress (NMSP<sup>3</sup>). According to the proposal there can be another type of property relations defined by a marriage agreement. The agreement can be signed either before, or after getting married and can include properties acquired before or during the marriage, and negotiation of parental rights after divorce. The purpose of this law is the easier negotiation of property rights during divorce. Most of the debates are around a clause that does not allow the contract to be changed before the end of the third year after marriage. The proposer, Svetoslav Spasov, comments that this contract will also benefit children from first marriages (Monitor, 2007) who often receive less care from parents than children from subsequent marriages.

At present there is only a shared asset regime for property obtained during marriage, and individual property rights to that acquired before the marriage or during, if received as inheritance or donation. This regime will remain in power for those who have not signed a (pre-)nuptial agreements.

### **1.1.11. Proposed Changes to the Family Code**

The legal definition of marriage and family relationships described above is currently being reviewed by the government. A proposal for new Family Code suggests redefining the centrality of marriage in intimate relationships and would introduce legal recognition of de-facto cohabitation and would introduce easier and more flexible marriage, divorce and adoption procedures<sup>4</sup>. The motivations for the proposed changes to the Family Code

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<sup>3</sup> This is a liberal political party founded in 2001 under the name National Movement Simeon II. The name of the party was after the former king of Bulgaria, who won the elections in 2001 and became Prime Minister. At present the party is among the biggest in the country.

<sup>4</sup> The proposal was adopted on the 12.06.2009 and promulgated in State Gazette 47/2009. It is coming into force on the 1<sup>st</sup> of October 2009. The legalisation of de-facto cohabitation was revoked. The text of the

are based on the argument that there have been significant social and economic changes that have influenced the attitude and understanding of marriage and family including changes in the functions of family, and in the positioning of family members, their relationships and responsibilities (Council of Ministers, 2008, p 61). Some of these changes include a ‘new value system’ and ‘revival of the economic function of the family’, and are linked to ‘the recognition of basic civil rights, mobility, and freedom of personal life’ (Council of Ministers, 2008, p 61). The opinion of the expert group is that the present Family Code does not meet public needs and that it is necessary for regulations to be consistent with the ‘requirements for modern legislation that corresponds to the stage of social development and to the new responsibilities that families are facing in raising children’ (Council of Ministers, 2008, p 61). The proposal is also based on attempts to synchronise Bulgarian legislation with some international legislation related to children’s and parental rights, for example, Convention for the Protection of Human Rights and Fundamental Freedoms, Convention on the Rights of the Child, Convention on the Protection and Co-operation in Respect of Intercountry Adoption, European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

The marital union is one of the areas where serious changes have been proposed. The new Family Code, if adopted as it is proposed at present, would remove announcement of marriage in advance (at present it is 30 days before the marital ceremony) and will introduce a requirement for written informed consent from the couple about the health of both parties to be married, which means that people with diseases that are considered to endanger the offspring would be allowed to get married. The agreement to enter a marriage used to be ‘on mutual agreement’ but this will be extended to ‘mutual, free and explicit agreement’. Text to the effect that the municipality where the marriage contract would be signed can be freely chosen is added, although the practice existed previously but was not set down in law. There would be a new provision introducing the right to a life free from domestic violence: ‘every partner has the right to protection against

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proposal can be found at: <http://www.parliament.bg/?page=app&lng=bg&aid=4&action=show&lid=2133> [accessed 12.07.2009], and the Minutes from the parliamentary discussion: <http://www.parliament.bg/?page=plSt&lng=bg&SType=show&id=587> [accessed 12.07.2009].

domestic violence'. The freedom to choose a profession would be extended to 'freedom of personal development and choosing a profession'. It would also allow for a religious marital ceremony to take place independently from the required civil one, not only after the civil ceremony as in present. However, religious marriages would still have no legal status.

For the first time in Bulgarian family and civil law there would be regulation of 'de facto conjugal cohabitation' [фактическо съпружеско съжителство] of a man and a woman (Art.13: 1), which makes it unavailable to same-sex couples. The registered cohabitation would have legal status in relation to property and parental rights. It would have to be registered officially by the two partners, but could be un-registered by only one of them. A person would not be able to be registered in two cohabitations at the same time (Art.13:3).

Another novelty in Bulgarian family law would be the different options for property regimes. Couples entering into marriage would be asked to sign a declaration about their property regime, if they have chosen a different from the default one, which is mutual property. There are some transformations in what would be considered 'mutual property', for example money in bank accounts would no longer be regarded as mutual property. All belongings acquired during marriage would still belong to the two partners and it would still be assumed that there would be mutual contribution in the form of resources, labour, childcare or housework. The new property regime that the couple would be able to choose is 'separate property', where all property would be held by individuals in the marriage. During divorce the other spouse would have the right to some of the property if s/he has contributed to it with 'labour, resources, childcare, housework, or altogether with help' (Art.34:2). If something has been given to the other spouse for use, s/he has to return only the benefit/ production from it that is present at the day when it is asked for. The third option would be signing a marital agreement either before or during the marriage. The couple would be able to choose one of the above regimes, but would also be able to negotiate terms and conditions. This could include agreements about rights to



property acquired before or during the marriage; management and use of property including family home; contribution to expenses and obligations; property rights after divorce; support during the marriage and alimony; support of children; other property relations.

It would be unacceptable for a couple to agree that the ‘agreement that the pre-marital property of one of the spouses would become mutual property’ (Art.39:2). There also could not be agreement about inheritance in the case of death of one of the spouses. The agreement would be in effect from the day of the marriage, or the day it was signed if it was after the marital ceremony. It could be changed at any point with agreement from the two sides, or could be cancelled on request of one of the partners if there are serious changes in the circumstances and the agreement seriously endangers the interests of the spouse, of their children under 18, or the family. The agreement would end with the end of marriage, except the parts that relate to relations after the end of marriage. A public national register of the property relations would be created.

This new piece of legislation would give more precise definition of origin of the children. For instance, the origin from the mother who gave birth with assisted reproduction would not be contested (62:6) and children born after assisted reproduction would be explicitly mentioned together with the other cases of origin from the father/mother. The novelty here would be the origin of children born to parents in de facto conjugal cohabitation – the registered partner of the mother would automatically become the father. The condition that a former husband is considered to be the father of a child born within 300 days after the termination of marriage would become relevant for the cohabiting union. However, if a woman remarries the father would be the new husband. Fatherhood could be declared by either the mother, or the father. An addition to the family law would be that an underage parent could recognise his child. At present the recognition of fatherhood can be contested by a 3<sup>rd</sup> party but according to the new version of the Family Code only the mother, the child, the father, or Social Services would be able to do this.

The text would also introduce new phrases like ‘biological family’, ‘right to marriage and family’, ‘spouse of the parent or the partner in de facto conjugal cohabitation’ (replaced ‘second mother and father’).

The overall direction of these proposed changes would remove marriage from its position of the ‘gold standard’ of intimate personal relationships and the environment for raising children. Marriage would become a more flexible commitment, through simplified procedures for entering and leaving the marital union and also through the different property regimes available to couples. Principles of voluntarism, gender equality, mutual support of family members, and independence of each of them would still be at the core of the definition of marriage, but the changes would bring much more recognition of children’s rights, interests, and individuality.

## **1.2. Divorce**

### **1.2.1. What is the law on divorce – grounds for divorce etc?**

The Family Code regulates divorces. According to this, there are three ways to end a marriage: with the death of a spouse, annulling the marriage and divorce. The marriage can be annulled when the requirements of entering into marriage were not met, or if a person entered the marriage under the threat for his life, health or dignity or that of his close ones.

The grounds for divorce are through breakdown of marriage or by mutual consent. In the first case 'the marriage has deeply and irrevocably broken down' (Art.99). The court needs to pronounce a guilty party unless the breakdown was caused by objective reasons which cannot be ascribed as guilt to any one of the spouses (Art 99:2). A divorce is not allowed in cases when the breakdown of the marriage is caused by the misbehaviour of the plaintiff only, and the other spouse insists on the preservation of the marriage. This is valid unless there are important circumstances requiring the granting of the divorce (Art 99:3).

In the case of mutual consent the court does not investigate the motives for termination of marriage (Art. 100). This type of divorce is not allowed for marriages lasting less than 3 years. In case of mutual consent the spouses are required to present an agreement regarding post-divorce parental rights, child support, and also regarding their property relations, the use of the matrimonial home, the support of the ex-spouses and the family names. The agreement is approved by the court if the rights of the children are protected. The pregnant wife or the mother of a baby under 1 year of age can stop a divorce filed by her husband. This is a new amendment (2007), previously the father could not even request a divorce (Family Code).

### **1.2.2. What is the history of divorce legislation? When did it become first available?**

As family relations were regulated by the canons of religion until 1945, it can be argued that the history of divorce starts with them. According to Todorova (2002) the Ecclesiastical Code of the Bulgarian Orthodox Church (1883) found divorce acceptable in the following circumstances: absence of the husband, but not the wife; where a wife deserted or expelled her husband for a period of three years without good reason, and refused to live with him; breaching the sanctity of marriage by adultery; unproved accusation of adultery; drunkenness and profligacy; violence by one spouse against the other; actions or threats against the life of the other spouse in any manner whatsoever; unnatural intercourse by a husband with his wife; imposing constraints on the religious freedom of a Christian Orthodox spouse and exerting pressure on him or her to adopt the other spouse's creed; where a spouse was sentenced to a severe punishment for theft, vagrancy or murder; where one of the spouses is unable to perform his or her marital duties; where one of the spouses suffers from insanity, idiocy, epilepsy or syphilis after the marriage.

There was an attempt to introduce civil legislation in 1936 ('Bill on the Conclusion and Termination of Marriage') which would introduce civil marriage for the first time and irretrievable breakdown of marriage as grounds for divorce, but this attempt did not succeed due to the strong objections of the Church (Todorova, 2002). After 1945 divorce became a matter of state regulation through different pieces of legislation. The legislation introduced in the first years of the socialist government was quite liberal. It created opportunities for more freedom of choice and change of partners, some of the grounds of divorce were: incompatibility in the characters of the spouses; continuing misunderstandings; mutual consent (Vodenicharov, 2002: 104). Divorce on mutual consent was revoked in 1952 in the Law on People and Family, according to which:

Each one of the spouses can ask for divorce if the marriage is deeply disrupted due to adultery, contagious or hereditary disease, long absence, physical or moral torture or other serious objective or subjective reasons, so that from the

point of the spouses, the children and society the continuation of the family life cannot be asked for [...] The claim is not respected if the disruption is due to the exclusive guilt of the plaintiff and the other spouse insists on keeping the marriage. (quotation from Popova, 2004, no page, my translation)

A conciliation session was introduced to the divorce procedures for the first time (Todorova, 2002). According to Popova (2004) the changes in the law were accompanied by a strong campaign against the irresponsible disruption of marriage and images of abandoned wives who refused to divorce in the name of the children were propagandized. This resulted in a state guardianship of the intimate life of the people and often the Party Committees were involved in discussion of private life of couples, which could lead to a ban on divorce and recommendations for another child that would strengthen the disrupted relationship (Vodenicharov, 2002 p105).

The restrictions were reduced to some extent after Todor Zhivkov came into power in November 1963. After some initial prosecutions of his opponents Zhivkov established a less totalitarian regime characterized by an increase in the social welfare provisions aimed at ensuring the 'happiness and wellbeing of the people' (speech of Zhivkov in front of the Central Committee of the Bulgarian Socialist Party on 31.07.1963 cited in Delev et al, 2003, no page). There was a new project for the Family Code in 1965, which came into force in 1968, where divorce by mutual consent became available again, the main argument for the changes was that the restrictions did not have the desired effect (Popova, 2004). The issue of matrimonial fault was dropped as a general ground for divorce and could be considered only if this was raised by the petitioner (Todorova, 2002 p8).

### **1.2.3. Do the major religious groups actively oppose divorce?**

The Bulgarian Orthodox Church has not been very conservative towards divorce although it is not encouraged. The Ecclesiastical Code allows up to three divorces and marriages. For a fourth marriage permission from members of the supreme church administration is

required and can be given only under special circumstances. The grounds for divorce have not changed from what was already discussed but the difficulty of getting permission has been reduced significantly according to the vicar bishop of Sofia Bishopric ('Standart' 15.06.2007). In an interview for a newspaper he argued that previously priests would wait longer before agreeing to allow divorce and would try harder to persuade the spouses not to 'destroy' their marriage. Now the procedure is much quicker and the common practice is to ask for divorce from the church only before planning to enter a second religious marriage. The most common grounds for divorce, according to the bishop, are adultery and childlessness.

The relaxed attitude of the church towards divorces can be explained with the long-established role and place of the church and religion in Bulgaria. The influence of the Bulgarian Orthodox Church over secular matters has traditionally been moderate due to the principle of caesaropapism<sup>5</sup>. Its influence was reduced even more during the socialist period. As a result of this Bulgarian Orthodox practice is more liberal and there is less strong opposition to issues like divorce and abortion in comparison with some Catholic countries, for example Poland and Portugal.

#### **1.2.4. What happens to property and pensions on divorce?**

The regime of mutual property ends with divorce and so does the right of the spouse (but not the children) to inheritance. These changes come into power with the court decision allowing the divorce. The right to property through a will is also lost as any wills that have been written during the marriage become invalid. If any gifts were given by any of the partners, or by their relatives the person who gave them can request the property to be returned.

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<sup>5</sup> The term relates to the hierarchy of the state and church power. The Orthodox Christianity is based on the so-called principle of 'caesaropapism' which means that the state has power over the church and is independent from it (*Knox, Z (2004)*). The term was coined by Arnold Toynbee. The opposite relation, the so-called hierocratism, is the one of the Roman Catholicism where the church had power over the state and hence has more influence over secular issues.

The former spouse has the right to alimony if s/he has not been 'guilty' in terms of the divorce and if s/he is labour-incapable and cannot support him/herself with property. The alimony is due up to three years maximum from the date of the dissolution of the marriage and is discontinued if the former spouse enters another marriage. The amount of the alimony is defined by the court and depends on the needs and the financial abilities of the former spouses.

Upon divorce, there are also changes that are not related to property – change of family names, change of responsibilities towards the wellbeing of the family etc.

Pensions are not an issue during divorce. Retirement pensions are individual, with no reference to marital status whatsoever. Hereditary pensions are in cases of death of the spouse where the issue of divorce is not possible.

#### **1.2.5. How are decisions about children made after divorce, and what principles apply concerning residence/ custody etc?**

The law does not state that the mother has priority rights over custody of the children. All circumstances in relation to children's interests are considered and decisions are made in the children's best interest. When the divorce is on the grounds of mutual consent the parents have to propose the residence and custody arrangements and the court will accept them if the rights of the children are protected. There will be a possibility to arrange post-divorce parental rights and obligations by (pre-)nuptial agreements.

When the use of the matrimonial home is decided, according to the law, the court needs to take into consideration the interests of the children, the guilt, the health conditions and other circumstances. Usually the parent with whom the children will live stays in the matrimonial home with the children.

### 1.2.6. Proposed changes to the Family Code

The proposed new Family Code also contains significant changes in the procedure for divorce, making it more flexible, more based on negotiations between the spouses, rather than on court decisions, and introducing a mediator. An important change relates to guilt—a guilty party would be announced only on request of one of the spouses, whereas at present a guilty party is sought automatically if the divorce is not based on mutual consent. This is particularly important because under the current law the guilty party cannot ask for a divorce previously. The new text also says that at any time the spouses could look for help from a mediator. Again the Department of ‘Social Support’ has a greater role – its opinion can be asked when the interests of the child are considered. At present divorce on the basis of mutual consent is not available to couples during the first three years of marriage but this limitation would be removed in the new Code. ‘If there is serious and firm agreement of the spouses for divorce, the court allows the divorce, without looking for their motives for termination of marriage’ (Art.52).

Gifts related to marriage, or made during the marriage would not be able to be claimed back, whereas currently they can be. According to the new proposal, if the family home is used by one of the former spouses and the other spouse has some ownership of the home the person using the property would have to pay rent. Parental rights at present are assigned by the court, but according to the new procedure they would be negotiated between the parents, or could be negotiated through the marital agreement. The option of a foster family is included in the new version of the law and so is the involvement of Social Support agents who would give their opinion about parental right if no agreement has been reached, or if there is change in circumstances and the parental rights have to be changed. There is a new provision that in-law relations are terminated with the end of marriage.

These changes would not only make divorce more accessible but would also define the couple as the active parties in the negotiations. The accent would be put on the agreement



of the couple with regard to the ending their marriage and to arrange all the issues following from this, with less involvement of the court. The rights of the children of the marriage including the right to personal relationships, would be protected more rigorously. There would be new options for additional help from mediator and Social Services. All this is related to making divorce less stressful for all parties participating in them, including the children.

### **1.3. *Non-marital heterosexual relationships***

#### **1.3.1. Is there law governing heterosexual cohabitation/ de facto relationships?**

There is no separate piece of legislation/ policy document that governs cohabitation/ de facto unions. There are scattered and sporadic texts that can be found in a few policy documents and laws, but this does not make cohabitation visible in terms of legislation. With some small exceptions that are explored in detail here, there are no provisions regulating these relations and it can be argued that these relations do not exist in the eyes of the Bulgarian judicial system.

In contrast to the poor legislative presence of cohabitation, there is very heated public debate on these issues. Bulgaria is one of the countries in the EU with highest proportion of children born outside of wedlock and there is a rising concern about parental rights/ responsibilities and the rights of the children. In case of the separation of cohabiting parents the state does not have the right to intervene and decide about parental rights.

The Commission for Protection against Discrimination proposed four main changes of the Family Code that would regulate de facto unions: cohabitants to have the right to support after separation; cohabitants to have the right to contact with the child in case of separation; regulation of property relations; and the family name of the child (Sega, 2007). At present property rights and the right to support are not regulated at all. There are provisions about the family name and contact with the parents if the father has officially registered his paternity with the authorities.

Other proposals for changes to the Family Code came from the Socialist Party and from National Movement Simeon the Second. They have similar aims – to protect the rights of the children and to sort out property issues. It has not been discussed that these entitlements should be available for same-sex couples too. In spite of the discussions no changes in the direction of recognition of cohabiting relations have occurred so far.

### **1.3.2. What are the rights and responsibilities of heterosexual cohabitants/ de facto partners?**

The lack of recognition of cohabiting relations in the legislation leads to no rights and no obligations between cohabiting partners. This does not relate only to the relationship between the couple but also to their children –only the partner who is the biological mother/ father, or the legal adopter/ carer of the children has obligations and parental rights. The biological father has the opportunity to ‘recognise’ the child as it is worded in the legislation, which means that he registers himself as the father at the birth or soon after that. Non-married, non-biological parents cannot do this, but they can adopt their partner’s biological children.

It can be argued that rights and responsibilities in the Bulgarian legislation are bred only by marital and/ or blood relations, not by ‘de facto’ unions. Cohabiting partners do not have the right to inherit from other, no right to support, they do not have shared property rights, and they cannot take each other’s family name.

### **1.3.3. Are there fiscal benefits and privileges for cohabitants/ de facto partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers’ allowances, inheritance rights?**

There are no fiscal benefits that are targeted exclusively at cohabitants, quite the opposite– there are such benefits that cohabiting partners are excluded from because they are linked to marriage. Such benefits are the survivor’s benefit, and inheritance rights. Even if the non-married partner is entitled to inherit from their partner through a will, they will be in disadvantageous position because they need to pay higher taxes. However, all benefits that are related to raising children are not related to marital status and cohabiting couples are entitled to them. More examples of such benefits can be found in the section on Parenting and Reproduction.

Most of the benefits that state social security gives do not depend on marital status, but on the individual's social insurance status. These benefits are: benefits in the case of a temporarily reduced ability to work; disability; maternity, unemployment, old age, death (Social Assistance Law). Cohabiting (and single) people are entitled to all these benefits on the same grounds as married people. The only exception is in case of death of the insured person, when the spouse (marriage necessary) and/or children (official registration of fatherhood necessary if not married to the mother) can receive some of the benefits, as was discussed previously (Section 1 on Marriage).

**1.3.4. Are there social benefits and privileges for cohabitants/ de facto partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

There are social benefits that cohabitants can use. One of them is the opportunity to become a personal assistant of an impaired partner. According to the Social Assistance Law cohabiting partners (same-sex partners are not explicitly mentioned but they are not excluded either) can receive payments from the state to care for their disabled cohabiting partner. In the additional provisions the law defines cohabiting people as people 'living together in the same dwelling with or without kinship ties, registered [with the Municipality] at the same address'.

**Comment**

This understanding of cohabitating partnerships is quite common – the recognition of the relationship, as rarely found as it is, is always though living together. This makes LAT relationships impossible to legitimise. Another important aspect of the above mentioned understanding of cohabitation is that the relationship is often deprived of its sexuality. This occurs because the comprehension of cohabitation is broad enough to embrace all types of relationships, including non-sexual ones and is often referred to as ‘household’. In this sense the way cohabitation is constituted in the Bulgarian legislation and policy remains much closer to the way we (WP6) have framed our understanding of intimacy, rather than being a relationship linked to sexuality.

The provisions of the Criminal Procedure Code offer some recognition of cohabiting (homosexual and heterosexual) couples as it allows not only blood or marital relations (such as the spouse, ascendants, descendants, brothers, sisters) of the accused party but also individuals with whom he/she lives together to refuse to testify (Art.119). Article 121 also clarifies that a ‘witnesses shall not be obliged to testify on questions, the answers to which might incriminate them, their relatives of ascending and descending line, brothers, sisters, spouses or individuals with whom they in ‘factual cohabitation’ with. Unfortunately, there is no definition of ‘factual cohabitation’ in this law. According to the Civil Procedure Law a person can refuse to present a document if its content relates to the personal or family life; or its presenting will cause dishonour of the person or close people.

**Comment**

There is a very interesting example of how cohabitation is ‘written between the lines’ and is more a matter of good will, rather than a strictly defined legal term. The people who are entitled to municipal [state] housing are either individuals or families. Family is explicitly defined as ‘spouses and the underage children if they have not entered marriage’ (Law on Municipal Property, last amendment SG 63/03.08.2007), Additional Provisions: 2). The following people and families have priority: families with two and more children; single parents with underage children; families where one of the members has 1<sup>st</sup> or 2<sup>nd</sup> degree impairment; young families; families or individuals who have lived under hard living conditions longer (Regulations on the Implementation of the Law on Municipal Property, Art.7:3). At the same time, the same document uses the term ‘one-person family’ (Art. 17:1), rather than a ‘single person’, which demonstrates quite flexible understanding of what ‘family’ is. Furthermore, in the Annual Report of the Public Mediator (2002) is mentioned that people are required to present a copy of their marriage certificate to prove their civil status. However, one needs to get to the more ‘practical’ documents to understand the functioning of these entitlements. In the declaration that a person has to fill in to apply for municipal property the category is changed to ‘family/ household’, which makes non-married couples eligible to apply. The declaration defines family/ household members, income and housing conditions.

This situation shows the necessity of integrating cohabitation/ de facto partnership into legislation and policy and of making it more visible. The current situation reveals that there is significant discrepancy between legislation and practice, and also significant confusion of the terms used. The practical flexibility of the terminology that is currently used creates dependence on the personal judgement of the civil servants, rather than on legal rights and opens possibilities for corruption.

### 1.3.5. How different from marriage are non-marital heterosexual relationships in terms of fiscal benefits and social benefits?

<b>Benefit/ Privilege</b>	<b>Married Couples</b>	<b>Cohabitants</b>
Temporary employment incapacity Benefit (looking after ill family member)	Yes	No
Bereavement benefit	Yes	No
Hereditary Pension	Yes	No
Right to Inheritance	Yes (including 'reserved share')	No
Benefits on Inheritance Tax	Yes	No
Property Rights	Yes	No
Days off work for bereavement	Yes	No
'Nearest Relative' in Health Act	Yes	Yes (with conditions)
Removal of sanctions of some sexual acts (for example with persons the under age of 14)	Yes	No
Meetings/ phone calls/ correspondence while in prison	Yes	No
Right to family name change	Yes	No
Father's Parental Responsibility	Yes (including 300 days after divorce)	Not automatic
Adoption Rights	Yes	Yes, for other partner's children No, for other children
Right to become a personal assistant of impaired partner	Yes	Yes
Right to refusal of criminal testimony	Yes	Yes
Rights to transplantation of organs	Yes	Yes
Protection from rape	Yes	Yes
Protection from domestic violence	Yes	Yes

Marriage and non-marital heterosexual relationships are treated differently by the Bulgarian legislation. Marriage, quite often blood ties too, give rise to many rights and responsibilities that are not valid for not-married couples. Example of these are entitlement to days off work for care, shared property, right to financial support from each other, hereditary pensions. In other occasions, although these entitlements are not 'by default', they can be initiated, for instance: inheritance through will; parenting through 'recognition' of the child; visits in hospitals and information about a health condition through a declaration; social housing, and some income related social benefits through possibility of considering households instead of spouses. There are other situations where non-marital relationships are explicitly recognised, for example in cases of domestic violence and donation of organs.

It can be argued that Bulgarian legislation has a mixed approach to non-marital relations, encompassing situations of total denial of rights and responsibilities and some of equality and recognition. The co-existence of very old and traditional texts and very contemporary pieces of legislation makes the understanding of how different marriage and non-marital relationships are difficult. There is inconsistency in the overall approach, and also discrepancy between legislation and actual practices, for example in the cases of entitlement to state housing. LAT relations are the 'persona non grata' of the Bulgarian legislation and policy.

#### **1.3.6. What is the law (if any) regarding domestic violence, and what are the policy initiatives to combat it?**

The Law on Protection from Domestic Violence (2005) does not distinguish between the marital status of the people involved. According to the law domestic violence is 'any act of physical, mental or sexual violence, and any attempted such violence, as well as the forcible restriction of individual freedom and of privacy', carried out against individuals who have or have had family or kinship ties or cohabit or dwell in the same home (Art.2). People can seek protection under this law if they have suffered violence from: a spouse or



ex-spouse; a person with whom they are or have been in a de-facto union; a person with whom they have a child; relatives by ascending or descending line; brother or sister; relative by-marriage up to 2<sup>nd</sup> degree; guardian, trustee or foster parent. The procedure can be initiated by the victim, by the Executive Director of the Agency for Social Assistance or, in the cases of urgent protection, by siblings of the victim or other relatives of direct descent. In this sense the law provides for cases of de facto unions or people who used to live in de facto unions. LATs again remain outside the provisions.

### **1.3.7. To what extent are the two parties to a cohabitation/ de facto union treated as a couple/ unit, and to what extent are they treated as individuals?**

The two parties of cohabitation are most often treated as individuals, the law does not assume by default that there is bond between them. At the same time there are opportunities for recognition of the relationship and the cohabitants can undertake actions that will ‘make’ them a unit. In other cases, such as applications for state housing, the couples are treated as a unit to avoid the ‘draining’ of state resources.

#### **Comment**

##### **History: The socialist policy – relaxed towards cohabitation**

In 1945 there is a Supplementation to the Law on Support of the Victims of the Anti-Fascist and Anti-Capitalist Fight which allows the ‘illegitimate wives of people’s fighters’ to receive support. (Vodenicharov, 2004, p9).

## **1.4. *The Regulation of Sexual Practice***

### **1.4.1. Have male homosexuality and lesbian sexuality been criminalised? What was illegal? What is the history of its decriminalisation?**

A study of the historical development of LGBT rights of the Bulgarian Helsinki Committee (2001) found that the first text criminalising homosexual acts between men dates back from the rule of King Simeon (893-927) and according to this both partners are sentenced to death. However, if the “passive homosexual” is under the age of 20, his life should be spared because ‘his age shows that he did not realise what he was taking part in’ (Bulgarian Helsinki Committee, 2001, p22). According to the same study, the first time when homosexual acts between women were criminalised was in the Penal Code of 1951, where both acts of sexual intercourse and acts of sexual pleasure between people of the same sex are criminalised, the second one referring to women (Bulgarian Helsinki Committee, 2001). Homosexual acts were decriminalised in the Penal Code of 1968. However, in two cases homosexual acts are penalised differently from similar heterosexual acts: when the homosexual act is performed against the will or the partner, and when it disturbs public morality (Bulgarian Helsinki Committee, 2001, p23). However, there have not been any court cases under the charge of disturbance of public morality.

In the period post-1989, there were two paragraphs of the Penal Code (4 and 5 in Article 157) that were explicitly discriminatory towards homosexual people. They were both revoked in 2002 (SG/92/2002). According to the text of Art.157:4 of the Penal Code homosexual acts in public places and homosexual acts performed in a scandalous manner, or in a manner that may incite others to follow a path of perversion, were considered criminal acts. The second discriminatory paragraph Art.157: 5 made homosexual prostitution punishable: a person who persuaded another to homosexual activities with the purpose of acquiring possession or who by providing or promising benefit incited another to such activities should be punished by imprisonment of up to

three years and by a fine of up to one thousand levs. There was not a corresponding article for similar heterosexual activities, except for the cases of persuasion to heterosexual prostitution (Art.155).

According to the Report 'Bulgarian Legislation about Homosexuals' (Bulgarian Helsinki Committee, 2001: 7) 'not a single person was prosecuted for performing homosexual acts in public, for performing homosexual acts in a scandalous manner or in a manner that might incite others to follow a path towards perversion, or for homosexual prostitution'. These two paragraphs were considered 'dead', but their presence meant that some opportunities for discrimination against homosexual people were left open. The provisions had unclear definitions of *public* homosexual acts, performed in a *scandalous* manner. The two paragraphs were revoked mostly under the pressure of the European union, but not without the help of the Bulgarian LGBT sector. The Bulgarian Gay Organisation 'Gemini' organised a campaign and collected letters of support from the NGO sector and public figures, but the proposal for revoking of paragraph 4 was 'already a condition from the eurodeputies for continuing the of the negotiations with the EU and was inevitable' (Queer Bulgaria, 2004).

At present homosexual acts are punishable in some circumstances. For example, both sexual intercourses and acts of sexual satisfaction are punishable if they include using force or threat or using a state of dependence or supervision, as well as if they are with a person unable to defend him/herself (Art. 157). The homosexual acts that are considered criminal and the punishment are equalized with similar heterosexual acts. Previously, the punishment for the acts mentioned above used to include public reprobation, which was not provided for heterosexual acts of the same nature.

'Public reprobation' is the announcement of the sentence in public places, for example in front of the people where the accused works, or at an organization where s/he is a member (Law on the Administrative Punishments and Violations, SG 92/28.11.1969, last amendment 1999). In a recent case when a man was sentenced to public

approbation for not paying sustenance for his children the sentence was announced by the local radio station (Darik News, 2007).

The text providing public reprobation for homosexual acts which were considered criminal was revoked in the 2006 amendments and at present the punishments are the same for the similar actions, regardless if they were homosexual or heterosexual. For example, sexual intercourse with a person (from the same or the opposite sex) under the age of 14 is punished by imprisonment between 3 and 6 years.

#### **1.4.2. What is the age of consent (hetero/ homo)?**

At present the age of consent is 14 years of age, regardless of the gender of the partners. This issue is discussed in detail in the section on same-sex partnerships.

#### **1.4.3. Is incest illegal? What is its definition?**

There are very strict regulations in many pieces of legislation that make incest illegal. The Penal Code criminalises copulation between ascendants and descendants, between brothers and sisters and between adopter and adopted (Art. 154).

Marriages are prohibited between relatives of a direct line of descent; brothers and sisters, their children and other relatives of a collateral line of descent up to the fourth degree included, as well as for persons between whom adoption creates a relationship of a direct line of descent and of brothers and sisters (Family Code, Art.13:2).

The Health Law forbids artificial insemination of ova with spermatozoids from a donor who is in blood relations of direct descent with the woman whose ovum is used, or in blood relations of collateral line of descent up to the fourth degree included (Art.133). Based on these regulations the definition of incest would be sexual relations between

relatives of direct descent or of collateral descent up to the 4<sup>th</sup> degree. The religious understanding of incest is even broader if we judge by the relationships of people who cannot marry between each other. These include: all blood-related of direct descent; blood-related of collateral descent up to 5<sup>th</sup> degree (1 degree more than the civil marriage); relations through marriage up to 3<sup>rd</sup> degree and 4<sup>th</sup> when two brothers are marrying two sisters or a brother and a sister are marrying a sister and a brother (these restrictions are not relevant to secular ceremonies); through christening – first degree and second when godparents want to marry the parents of their godchild (not relevant for civil marriages).

#### **1.4.4. What is state policy around sex education in school?**

Sex education is not officially part of the school curriculum. It is a topic discussed during lectures on health education in some secondary schools. These lectures are part of the pilot education programme on 'Prevention of HIV/AIDS among Young People in and outside School' financed by United Nations Development Fund. There are 131 schools in 13 municipalities taking part in the programme. The programme started two years ago and so far 264 teachers and 8154 pupils have taken part in it. In 2005/2006 activities of 12 NGOs were part of the program, and in 2006/2007 the number of organisations involved was 14 (Ministry of Health, 2006).

However, health education is not compulsory and sex education lectures are not regularly held and not given priority (ASTRA Youth Group, 2006). Mincheva-Risova (no date) criticises the approach to sexuality in the education lectures as they focus primarily on health. She found that the main topics were concentrated on risk sexual behaviour and there were discussions of unwanted pregnancy, abortion, AIDS, sexually transmitted diseases, sexual violence. According to her the holistic inclusion of sexuality in education is missing from subjects like biology, psychology, ethics, literature, and philosophy. According to the Bulgarian non-government organisation Foundation Gender Education, Research and Technology (Marinova, 2007) the main source of sex education in schools

are biology teachers, but only when they are active and open to this subject.

In the light of all said so far, the conclusions from the project on sexual education Youth's Voice are not surprising: 'In the field of education, teenagers think they do not receive sufficient information about sexually transmitted infections, sexual relations, pregnancy and drugs [...] The reason why this information is inadequate is that until recently these were taboo topics in Bulgaria'. (ASTRA Youth Group, 2006: 20)

However, the researchers found that the 'climate' was slowly changing and the government and NGOs were engaging more with sex education issues. The LGBT organization Queer Bulgaria (2004) made negative comments on the content of the health and sexual education. According to them homosexuality as a separate form of sexuality and as personal choice is rarely mentioned in sex education. The 'expectations and assumptions are that there are no homosexual or bisexual young people among the pupils. Other sexual identities – transsexuals, intersexuals and so on are not mentioned at all' (Queer Bulgaria, 2004).

#### **1.4.5. What is the law concerning prostitution – is it legal/ tolerated/ illegal? Who is prosecuted (the prostitute or the purchaser of sex)?**

The legal situation of prostitution in Bulgaria is very complicated and dubious. At present there is no law directly concerning prostitution and therefore it is neither legal nor illegal. There have been discussions of the legalisation of prostitution during the past several years. In a recent interview the Chairperson of the Health Commission at the Parliament pointed out that the benefits from the existence of such law are the protection of women working as prostitutes, improving their condition and health, reducing trafficking and crime, regulation of this business that exists at the moment as part of the grey economy (Dark News, 12.12.2007).

At present there are texts in the Penal Code (Art.155) that relate to prostitution: persuasion to prostitution and giving premises for prostitution are criminalised but

buying or selling sex is not considered a criminal offence. There were some significant changes in this paragraph in October 2006 when the punishment for some criminal offences were reduced which created strong public debate (Centre of Women's Studies and Policies, 2007) and involvement of women's NGOs. As a result from the changes the penalty for persuasion to prostitution was reduced from 12 to 3 years and the higher penalty for some acts that were previously seen as more serious was removed (for example when the person is acting by an errand or in fulfilment of a decision of an organised criminal group; if the criminal act is against a minor, underage or mentally impaired person; against more than two persons; repeated criminal acts). After heated debates and strong objections from NGOs and experts the higher penalty for these acts was re-introduced in amendment from May 2007.

At present there is a very vague text in the Penal Code that prohibits pimping (Dimova, 2006). The text of Art. 329 suggests that an adult person who is capable of work but who does not engage in socially beneficial work and has non-working income with unlawful or immoral origin is punished by 2 years of imprisonment or approbation (Penal Code, SG 19/22.02.2008).

Until very recently there was a lump sum annual tax (patent tax) that male and female 'companions' had to pay (Law on the Income Taxes of Persons, until January 2008). The meaning of 'companions' was not explicitly defined but it is believed that it included (male and female) prostitution. Depending on the town and location the tax was between 6,440 and 3,000 BGN (3,299– 1,537EUR). For comparison, masseurs had to pay between 1,040 and 200 BGN (533 - 102EUR), fortune-tellers - between 5,600 and 2,000 BGN (2,869- 1,024EUR) annual tax. A reform of the tax system came into power in January 2008 and the patent tax was replaced by general income tax and the detailed list of professions and occupations was removed from the text of the law.

#### **1.4.6. Is there a public debate about prostitution, and if so, what are its parameters?**

There is heated public debate about prostitution focusing on prostitution, trafficking, and on the legalisation of prostitution. Various political figures make statements in support of the legalisation of prostitution and point out its benefits, while others, including the President of the Republic Georgi Parvanov, are strong opponents. Women's NGOs are also very active in arguing against a law legalising prostitution with the argument that it will be against the rights of women. For example, Rosa Dimova from the woman's organisation Centre of Women's Studies and Policies argues:

It is never mentioned, however, that the regulation of prostitution is a possible step toward violation of the human rights of women, especially of those that are victims of forced prostitution and trafficking and that it hides dangers for neglecting the principles of equality before the law and of protection against discrimination regulated by the Constitution and international treaties on which Bulgaria is part. (Dimova, no date, no page, my translation).

The Bulgarian Platform at the European Women's Lobby sent an open letter to the Minister of Interior in 2005 declaring its objection to the legalisation of prostitution. They suggested that such piece of legislation should be given full consideration taking into account the social, economic and political context, as well as the context of power relations between women and men (Bulgarian Gender Equality Coalition (2005). There is no organisation of sex workers in Bulgaria (Dimova, 2006) which can represent their rights and make demands. Sex- workers are usually represented by women's organisations who work in this area.

#### **1.4.7. Is there policy around trafficked women?**

Trafficking is relatively new issue in Bulgarian legislation and policy but it is one of the most discussed ones at the level of government, NGOs and amongst the general public. The main direction of the changes is influenced by the integration into legislation of



international documents, such as the Palermo protocol (United Nations, 05.12.2001); Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure (1985); Recommendation 1545 (2002) of the Parliamentary Assembly of Council of Europe on the Campaign against Trafficking in Women; Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (11.02.2002) (The Prosecutor's Office, 2005)

The first legislative text dealing with trafficking was the section that was included in the Penal Code (SG 92/2002). The text does not relate only to trafficked women, but to any actions of gathering, transporting, hiding and accepting different people or groups of people with the purpose to use them in debauched actions, forced labour, organs, or to keep them in forceful submission without their consent.

In 2003 a new Law on Counter-Trafficking of People was adopted, this is the first law dealing with the issue of trafficking in Bulgarian legislation. The law regulates the opening of national and local commissions for fighting the illegal traffic of people, the powers of these different authorities, the coordination among them, and collaboration with NGOs. It provides for the protection of the victims, the opening of shelters and centres to help the victims, and to offer healthcare and information about the administrative procedures. The law states that efforts will be made to support the reintegration of victims. According to the additional provisions of the law 'illegal traffic of people' is the 'gathering, transportation, transfer, hiding or acceptance of people, regardless of their will, by duress, abduction, illegal deprivation of liberty, fraud, abuse of power, abuse of subjection or through giving, receiving or promising profit in order to obtain the consent of a person exercising control of another person, when it is done for the purpose of exploitation'. Exploitation is defined as the 'illegal using of people for vicious practices, for divesting of body organs, for compulsory labour, for enslavement or placing in similar position' (Law on Counter Trafficking of People,

2003).

Following the regulations of the law, a National Counter-Trafficking Commission was established to coordinate and monitor anti-trafficking actions. A National Programme for Prevention and Counteraction to the Trafficking of People and Protection of the Victims is developed every year by the Commission. Some of the main purposes of these programmes are: creating an effective anti-trafficking network of commissions, centres and shelters; knowledge and consciousness raising contributing to public intolerance to trafficking; programmes for education and qualification of people dealing with prevention of trafficking; protection, support and reintegration of victims of trafficking; international collaboration; additional legislative measures (National Counter-Trafficking Commission (2006).

There have been numerous initiatives at national and international level to combat the trafficking of women. As part of these initiatives asylums and shelters for victims of trafficking have been established. Court prosecution is initiated for all cases of trafficking that are registered at the asylums. Another burning problem linked to trafficking is the selling of Bulgarian babies abroad, which has also been in the centre of the attention of the government and the mass media<sup>6</sup>.

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<sup>6</sup> For examples of this: BBC: *Baby smuggling in Bulgaria* (31.12.2007), *Bulgaria's disturbing baby market* (23.02.2005); *The People*: 'Buy Our Babies. The People Exposes Vile Trade in EU Kids Sold & Smuggled to UK' (27.05.2007)

## **1.5. *Same-Sex Partnerships***

### **1.5.1. What is the age of consent? What is the history around the age of consent?**

The age of consent is regulated by the Penal Code and there have been several occasions when it was changed. At present the age of consent is 14 years and it was equalised for homosexual and heterosexual acts in 2002. The first time when the age of consent was equalized regardless of the sex of the partners was in 1986, but was raised for homosexual acts to 16 in 1997, while for heterosexual acts it remained 14.

The Penal Code from 1951 criminalised all homosexual acts, including these between women for the first time. The punishment was more rigorous if the acts were with people under the age of 14. In 1968 homosexual acts were legalized for the first time and the age of consent was 18 years, 4 years older than for heterosexual acts (14 years). Only adults, aged 18 years or over, had penal responsibility for homosexual acts. This means that there were no legal restrictions on non-adults against performing homosexual acts. In 1986 the age of consent for homosexual acts was reduced to 14 years and thus was equalized with that for heterosexual acts. At the same time the age of people carrying penal responsibility for homosexual acts was reduced to 14 years. This meant that people aged 16-17 were included and could be punished if they were having sex with someone under the age of 14.

In 1997 the age of consent for homosexual acts was raised again, this time to 16 years, while the age for hetero acts remained unchanged- 14. This change was part of wider amendments aiming at reducing criminal actions during the economic and political transition. Terms like 'blackmailing', 'money laundering', 'mafia' were introduced in the legislation for the first time, the sanctions for financial fraud, trafficking, terrorism and crimes against the intellectual property were raised (Kostov, 1999)

The age of consent was equalized again in the Penal Code of 2002 at 14 for all sexual acts. At the same time the punishment for same-sex sexual acts committed with the use of violence was increased from 1 - 5 years to 2 -8 years (equal with heterosexual acts). The changes in 2002 happened after recommendations were made by the European Commission in the Regular Report on Bulgaria's Progress Towards Accession. It was noted in the Report that:

Bulgarian law currently discriminates against *homosexuals*. Discriminatory provisions in the Penal Code need to be removed to avoid discrimination (European Commission, 2001: 22)

A proposal for amendments to the Penal Code was made by a group of members of parliament representatives from all four parliament groups. The Proposal aimed at equalisation of the age of consent, of the legal situation for homosexual and heterosexual prostitution, and the penalties for rape, as well as decriminalisation of provisions on homosexual actions in public. The motivation for the changes was that the texts of the Penal Code:

contain archaic formulations, defining homosexual acts as perversions and criminalise paid homosexual love [same-sex prostitution], which supports a discriminatory regime towards homosexuality. The existence of the mentioned texts contradicts the regulations of the European legislation, breaks international contracts and puts under question Bulgaria's accomplishment of the political criteria for EU membership. (Draft Law on Alteration and Supplementation of the Penal Code, 2002)

The proposed changes were accepted but there were heated debates in the Parliament including homophobic statements.

### **1.5.2. Is there provision for the recognition of same-sex partnerships (or are same-sex partners "legal strangers")?**

Same-sex couples are 'legal strangers' as the Bulgarian legislation does not offer any possibility for recognition of their relationship. The rights and obligations are not very

different from hetero-couples who are not married but there is one significant distinction - same-sex couples are deprived of the possibility of getting married. According to the Constitution and the Family Code marriage can be contracted only between a man and a woman. Therefore, relationships between same-sex partners are regulated by civil law only and do not give rise to any rights and obligations.

**1.5.3. If so, what is it called – and has there been a debate about whether it should be “marriage” or not? Outline the parameters of the debate in parliament, and in the media, and who the key players were/ are, including religious groups, if applicable.**

The possibilities for recognition of same-sex relationships are a ‘hot’ topic for LGBT organisations and are very often discussed. The organisation Queer Bulgaria carried out a study in 2005 on the access to health care of LGBT people in Bulgaria (Queer Bulgaria, 2005). The study was aimed at in nine towns in Bulgaria and 280 people were interviewed, of whom 30% were women, 67% men, 2% transgender, and 1% did not define gender; 55% were gay men, 23% lesbians, bisexual – 26%, 3% were heterosexual having sex with same sex partners, and 3% were transsexual. The study covered a wide range of issues including healthcare, discrimination, and legal recognition of same-sex relationships. According to the findings, 72% of the respondents supported the legal regulation of partnerships, same-sex marriage was supported by 42% of the interviewees. Another 42% said that they would raise a child in a same-sex couple, and 72% thought that a same-sex couple should be able to raise a child if they wanted to. The total sum of the percentages is more than 100 because more than 1 answer could be given. In relation to discrimination, 17% of the interviewed women and 31% of men admitted that they had been a victim of discrimination.

Another organisation, Bulgarian Gay Organisation ‘Gemini’, made attempts to receive wider support for LGBT rights during the last elections in 2005 (BGO Gemini, 2005). During the campaign they sent 300 questionnaires to political parties and leaders participating in the elections to see which of them are likely to respond positively to the

needs of the LGBT people. Some of the main issues they wanted support for were legalisation of de facto unions of same-sex and different-sex couples; criminalisation of hate crimes; inclusions of the term 'sexual orientation' in all pieces of legislation dealing with grounds for discrimination, including the Constitution; a simplified procedure for changing names and personal documents where gender identity will be considered rather than sex-reassignment. The results of the campaign were published in the report *Politicians Ignore the Human Rights of Homosexual, Bisexual and Transgender Citizens of Bulgaria* and according to it only one politician from all 300, the Minister of Defence Svinarov, completed the questionnaire, all other politicians ignored the LGBT issues. The comment of the organisation was:

We are concerned that this ignorance and inadequate attitude towards gays and lesbians, demonstrated by politicians during the last 13 years, is likely to be the official position of the next government (Petrova, BGO 'Gemini', 2005, my translation)

Following this unsuccessful attempt BGO 'Gemini' started an initiative for the legal recognition of de facto unions for both same-sex and heterosexual couples but there has not been much reaction to it either. The latest action of the NGO was to organise a pride 'Me and My Family' in July 2008 in support of same-sex parenthood.

#### **1.5.4. If there is recognition, what does it entail? Rights and responsibilities?**

There is no legal recognition of same-sex partnerships and no rights and obligations arise.

#### **1.5.5. Are there fiscal benefits and privileges for registered same-sex partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers' allowances, inheritance rights?**

At present most benefits are related to the individual, or to having children. Individual benefits are: benefits in the case of temporarily reduced ability to work; disability; maternity, unemployment, old age, death (Social Security Law) and they are available to

same-sex partners as individuals. The exclusions are the same as for non-married heterosexual couples – for example survivor's benefit. Another group of benefits are those related to raising children. They are not related to marital status and same-sex couples are entitled to them.

In this sense it can be argued that discrimination is not based on sexuality as the conditions are the same for non-married heterosexual couples. The marriage-normative legislation creates limitation to the rights of same-sex couples. However, marriage is very closely related to sexuality as it is defined as a 'union between a man and a woman'. The situation will change significantly if the new proposal for Family Code (2008) is adopted. The heterosexual couples who are cohabiting will receive legal recognition and will have rights and obligations in relation to support, parenting, and property. Same-sex couples will not have the right to register in cohabiting unions and will be discriminated against.

**1.5.6. Are there social benefits and privileges for registered same-sex partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

The social benefits are the same as those of non-married heterosexual couples. The legislation does not distinguish the sex of the couples, beside of those entering marriage. Furthermore, the entitlements are on the basis of living in the same households, or on taking care of children, which leaves them open for a wider range of intimate relations. This however, as I argued previously, brings about de-sexualisation of the intimate life of non-married couples as they are seen as 'households', rather than partners.

**1.5.7. Is there recognition of same-sex domestic violence, and are there policy initiatives to combat it?**

The law on protection from domestic violence does not define the gender of the victim or the aggressor and therefore same-sex couples have the same rights and protection as all

victims. There are no policy initiatives targeted exclusively at victims of same-sex domestic violence.

#### **1.5.8. Which terms were/are used to describe homosexuality in the law?**

There are several phrases used in the legislation referring to homosexuality. In the present Penal Code the expression is ‘whoever has sexual intercourse or act of sexual pleasure with a person from the same sex’ (Art.157). There are two points that are important here. The first one is that the text does not refer to a ‘homosexual person who’ but to any person, or ‘whoever’. The second point is that the legislation distinguishes between homosexual acts performed by women – by the use of the phrase ‘sexual acts of pleasure’, and those performed by men – referred to as ‘sexual intercourse’ (Bulgarian Helsinki Committee, 2001).

The two paragraphs of Article 157 in the Penal Code criminalising homosexuality in the past used different expressions. In paragraph 5 revoked in 2006 the text was referring to ‘a person who persuades another to homosexual activities’. The other paragraph (4) had the expression ‘homosexual acts in public places’ and ‘homosexual acts performed in a scandalous manner or in a manner that may incite others to follow a path of perversion’. This text was revoked in 2002. These texts are openly referring to homosexuality and the second one is even making connections between homosexuality and perversion.

In the *National Programme for Prevention and Control of AIDS and Sexually Transmitted Diseases 2001-2007* the expression ‘men who have sex with men’ has been used as a way of describing homosexuality. Another group mentioned is ‘bisexual people’ (Council of Ministers, 2001, p 6).



## **1.6. Parenting and Reproduction**

### **1.6.1. How are mothers/ parents supported financially and socially by the state? (tax allowances, maternity leave, parental leave for fathers/ partners, for care of older children, child benefit, child care provision).**

The support of people raising children is based on the National Strategy for the Child and on the Law on Protection of the Child (2000). The main principles of the Law include protection of the child based on: recognition and respect for the personality of the child; bringing up the child in a family environment, best provision for the child's interest, special protection of children at risk or of gifted children (Art.3). According to Sotiropoulou, V. and Sotiropoulos (2007 p13) the policy of the Bulgarian government towards parenting and children had predominantly been focused on cash benefits, but has gradually been shifting towards the provision of social services. However, they find that there is lack of information about the new child welfare initiatives and about available resources (Sotiropoulou, V. and Sotiropoulos, 2007: 9).

Rights to childcare benefits are regulated by the Law on Family Benefits for Children. In relation to citizenship the following groups of people are entitled to childcare benefits: Bulgarian citizens; families of children who are Bulgarian citizens and who reside in the country; and families of non-Bulgarian citizens permanently resident in the country if the receiving of benefits is prescribed by another law or international treaty signed by Bulgaria. The people who can receive benefits are: pregnant women; parents of children under 18 or families of relatives, 'close ones' or foster families for children who live with them.

There are several types of child-related benefits:

- **Right to paid absences during pregnancy for tests or medical treatment**

There is no limit to the time that the pregnant woman can use, however it has to be necessary for the procedures to be done during working hours (Labour Code, Art. 157:7).

- **Right to Compensation due to Pregnancy and Childbirth (315 days)**

All pregnant women are entitled to this compensation, regardless of their employment status. However, if they were in employment for 6 months prior to their maternity leave, they are entitled to additional compensation after the end of the 315 days. This period was increased from 135 to 315 days in January 2007.

The amount of the compensation is 90% of the salary of the woman or equal to the minimum wage in the country, depending on which is more. If the woman is not employed she will receive the minimum wage. The entitlement to this benefit depends on the income of the family not exceeding the maximum amount defined by the government. The 315-days entitlement is used before and after the birth of the baby, 45 days have to be taken before the due date. If the baby is born before the due date the unused days are taken after the birth. If the child is still-born, dies or is given for adoption, the mother is entitled to compensation for only 42 days after the birth. If she has not recovered after 42 days the period can be extended after an examination by a health professional. If the mother dies or is seriously ill, the compensation is paid to the person taking care of the baby.

After the end of the 315 days of maternity leave, there is a right to compensation for raising a small child (discussed below) until the end of the second year. After that period the leave of the carer can be extended until the child is 3 years old and it is counted towards employment service but it is unpaid.

- **Compensation for Changing Occupations during Pregnancy**

If the woman is transferred to a different job due to pregnancy or breastfeeding she can

receive financial benefit if her new wage is lower than the previous one. The daily benefit is calculated as the difference between her current average earning and her average earnings in the previous job during the last 6 months.

- **Paid leave for Breastfeeding**

Women who work full time and are breastfeeding are entitled to 2 hours a day of paid leave until the child is 8 months old, and 1 hour if they are working 7 or less hours.

- **Singular help/benefit at childbirth**

This is a lump sum paid to the mother at the birth of a living child and is not related to income. The Law for the State Budget for 2008 (December 2007) defined the amount of 250 BGN (128 EUR) for first child, 600 BGN (307 EUR) for second and 200 (102 EUR) for every further child. Previously benefit was 200 BGN for first, second and third child and 100 BGN (51 EUR) for every further child. These changes are related to the government policy to encourage parents to have a second child that have been initiated in response to the decreasing popularity of the 2-children family model. This model was traditionally the most popular among the Bulgarians but has recently been replaced by the 1-child family. There are studies, for example the World Values Survey (1999) and the Census 2001 (National Statistical Institute, 2001), showing that people find the 2-child model as most desirable but do not practice it. The number of live births per woman aged 15-49 has been declining between 1989 and 2002 when it reached its lowest level of 1.21 live births per woman of fertile age. There has been a slight increase during the last four years with available statistics (2005 and 2006).

Year	Crude Birth Rate (live births per 1000 population)	Rate of natural population increase (Births minus deaths per 1,000 population)	Total fertility rate (Live births per woman aged 15-49)
1990	12.1	-0.4	1.81
1995	8.6	-5.0	1.23
2000	9.0	-5.1	1.27
2001	8.6	-5.6	1.24
2002	8.5	-5.8	1.21
2003	8.6	-5.7	1.23
2004	9.0	-5.2	1.29
2005	9.2	-5.4	1.31
2006	9.6	-5.1	1.38
Source: National Statistical Institute Bulgaria (2006) Население и демографски процеси [Population and Demographic Processes], <a href="http://www.nsi.bg/Population/Population.htm">http://www.nsi.bg/Population/Population.htm</a> [15.02.08]			

The policy of the Government is based on studies on family values like the ones discussed above and on the assumption that people would like to have 2 children if they had more financial resources. Hence the big difference between the amounts given for a second child and for other children. To my knowledge, the gap in the amounts for first and second and for second and third child has never been so big during the whole history of the benefit.

- **Right to compensation for raising a small child (until 2 years of age)**

After the period of the Compensation for Pregnancy and Birth the (adopting) mother is entitled to additional paid leave, which is a fixed amount usually the minimum wage and is linked to income not higher than an amount defined by the government. This paid leave can be used by the (adopting) father, or the person who is taking care of the baby. If the additional paid leave is not used, of example if the mother returns to work, she is paid 50% of the amount of the compensation to which she was entitled. The right to

compensation is automatically transferred to the father when the mother passes away or if she is deprived from parental rights. The amount of this support has just been raised by the Government to 220 BGN (112 EUR) (Law for the State Budget for 2008, December 2007).

- **Child Benefit**

The Child benefit is a fixed amount paid to the parents or carers on monthly basis until the child finishes High school but not more than 20 years of age. Previously all children were entitled to this benefit, but at present it is income related. A new criterion was introduced in 2006 – that the child is regularly attending school (not more than five unauthorised absences per term). This is related to declining rates of school attendance of children in disadvantageous [unequal] position. The income of the family per family member for the previous six months has to be under a fixed threshold for the child to be entitled to benefits. In the case of divorced parents the income of the parent who is not taking care of the child is not taken into consideration. The threshold income per family member for 2008 is 300 BGN (153 EUR), families below this income will receive Child Benefit of 25 BGN (13 EUR) per month.

- **Family Tax Relief**

Family Income Tax was introduced in Bulgaria in 2006 as part of the measures of the government to promote childbirth. One of the working parents can receive tax relief for raising a child under the age of 18. The amounts deducted from the annual taxes are: 420 BGN (215 EUR) for 1 child; 840 BGN (429 EUR) for 2 children, and 1260 BGN (644 EUR) for three and more children (Law on the Tax of the Income of Natural People, 2007). Bulgarian citizens and foreigners who are asylum seekers or of refugee status are entitled to this benefit. The amount can be claimed by one of the parents (providing a declaration from the other parent that s/he will not use tax relief), guardian or trustee, a family member of relatives or close people if the child lives with them for more than 6

months, or a foster parent.

The tax relief policy was changed and new types of taxation were introduced in 2008. The regime of progressive taxation was replaced by flat taxation of 10% for all working people, regardless of their income. The child tax relief was stopped and was replaced by an increase in child benefit. This means that the money was re-directed from people with high salaries who were claiming tax back to the poorest families whose income is below the threshold defined by the Parliament (Minutes from the Session of the Labour and Social Policy Commission of the Council of Ministers, 09.11.2007)

- **School Benefit**

This is a lump sum paid to the families of children starting school to cover some of the expenses at the beginning of the new school year. This benefit is income related and was introduced in 2005.

- **Social Investment Benefit**

Changes in the Law for Family Benefits for Children were approved by Parliament in January 2006, offering additional support to people with children (National Assembly, 2006). This replaced the term 'pay in kind' [плащане в натура] with 'social investment' in an attempt to change the negative social attitudes towards family benefits. Alternative forms of family benefits were included, for example payment of nursery fees and kindergartens; entitlements to free school dinner; payment for items necessary for school education.

- **Programmes 'In Support of Motherhood' and 'Responsible Parenthood'**

The Programme 'In Support of Motherhood' started in 2007 in connection to the attempts of the government to decrease gender differences in employment related to higher unemployment for women, lower employment rates, and gender pay gap (Ministry of

Labour and Social Policy, 2007<sup>7</sup>). Within this programme unemployed people are paid by the government to look after children under the age of three years whose mothers are entitled to paid maternity leave but have decided to go back to work.

There is another benefit in support of motherhood, but is not part of the programme as it has existed since 1998. Mothers who have given birth or adopted more than 3 children are considered to be 'of many children' and are entitled to a free return train ticket to a chosen destination once a year (Regulations of the Social Security Law Implementation, SG 133/11.11.1998; Decree no 295 of the Council of Ministers from 20.12.2001, SG, 112: 29.12.01). Other groups with entitlements to discounts/ free travel are war veterans, pensioners, students. Fathers with many children are not entitled.

The Programme 'Responsible Parenthood' is related to the attempts of the government to increase the birth rates and includes a series of measures, some of them discussed above. Parents who are not sending their children to school regularly will receive lower Child Benefits – 16.5 levs instead of 25.0 levs when the child has more than five unauthorised absences from school per term. Other measures include an increase in the amount of benefits, raising the income threshold above which families with children are entitled to child benefit, implementation of programmes promoting family planning and reducing unwanted pregnancies, education programmes for developing parental skills; renewal of childcare institutions (Nikolova, 2007).

- **Anti-benefit: the 'Bachelor Tax'**

There is a very interesting example of sanctions of the state in relation to parenting. During the period of state socialism there was the so-called 'Bachelor Tax', which was a monthly payment that women aged 21 to 45 and men aged 21 to 50 had to pay for not having children. The tax was 5% of taxable income at the age of 21 and increased with

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<sup>7</sup> Ministry of Labour and Social Policy (2007) *Националната програма "В подкрепа на майчинството"* [National Programme 'In Support of Motherhood'], Available from the World Wide Web: <http://www.mlsp.government.bg/bg/projects/Programata%20za%20maikite-201206.doc> [accessed 20.02.2008]

age to reach 15% at the age of 35 (Ministry of Labour and Social Policy, 2006). The Bachelor Tax was payable even by married people who wanted but could not have children for medical reasons. The motivation for the existence of this tax, together with some other restrictions is outlined by the Prime Minister and Head of State Todor Zhivkov:

Some administrative measures should be considered for the overcoming of parental egoism, of the unwillingness to give birth and raise children. Those who do not want to have enough children have to take part in the support of other people's children (Zhivkov, 1967 cited in Kalinova and Baeva, 2006: 221, my translation)

The Bachelor tax was introduced in 1951 in a state Decree for Stimulating Birth Rates and was abolished in 1990 (Popova, 2004), however there were discussions about its revival in 2006. The parliamentary and public debate was mostly against the tax as it was seen as inappropriate and going against the democratic principles of personal freedom. The main argument of the person who made the proposal for the renewal of the tax in the Parliament was related to the payments of tax. He thought that people who do not raise children do not contribute to the future labour force and are limiting the future pension resources and therefore they should start paying additional tax.

Interestingly a similar tax existed before the socialists came to power. In 1935 the government adopted a Regulation-Decree on the State Budget according to which all employees at state jobs would pay a tax of 5% of their income if it is below 1730 leva and 10% if higher (Ivanov, 2008). All unmarried or widowed employees had to pay this tax, except for military servants and religious servants.

### **History of the Child-Related Benefits and the Pronatalist Policies in Third Bulgaria (since 1878)**

Protection of working pregnant women and entitlement to maternity leave was regulated for the first time in 1905 (Ivanov, 2008). After the First World War the first Law for Public Health (1929) was adopted regulating the state health support of mothers and



children, and also putting a ban on abortion.

The first child benefit in Bulgaria dates back from 1941, when the government started paying all state servants monthly benefits of 100 leva for each child under 21 who is born within marriage or adopted. If the children are aged 21 or more they are entitled to benefit if they are still studying at school or university, or if they have some mental disability (Ivanov, 2008). Additional benefits of 100 leva for second child, and 200 leva for third and following children were introduced in 1941. In 1942 all child benefits mentioned above are extended to all employees taking part in the state pension fund. At the same time this law puts restrictions on the people who are entitled to child benefits – they have to be Bulgarian nationals of Bulgarian origin, which is in line with the nationalist policy of that time (Ivanov, 2008).

In 1943 the Government adopted a whole pronatalist policy for the first time. Law on Families with Many Children was passed aiming at protection of the family, support of families with many children, and stimulating higher birth rates and marriage rates (Ivanov, 2008). It is interesting how the law defines who should be encouraged to marry and have children – these are Bulgarian citizens, who are not mentally ill, underdeveloped, and do not have hereditary disabilities or diseases that can be harmful for the offspring. Couples where the male partner is over the age of 40 are also excluded from the policy (Ivanov, 2008).

#### **1.6.2. What is the law about registering the birth of a child, and its parents? Who is the father (biological father versus partner of mother etc)? How important is biological versus social parenting, and has there been a debate about this?**

The registration of births, as well as of marriages and deaths, is regulated by the Civil Registration Act (SG 67/ 27.07.1999, last amendment 2006). It is an obligation of the medical staff responsible to inform the local authorities in writing about the birth of a

child born either in or outside a hospital. Birth certificates are issued on the basis of this written notice no later than seven days after the birth of the child.

Verbal announcement of the birth is also made and this is an obligation of the father. The announcement is done in person no later than five days after the birth of the child, the day of the birth is not counted. If the father cannot announce the birth, for example due to illness, imprisonment, absence, or because he is unknown, another person present at the birth can do it. If nobody announces the birth the civil register servant registers the child based on the information from the hospital. The birth certificate contains information about the name, gender, citizenship, the Unified Civil Number<sup>8</sup>, information about the parents – such as name, date of birth, address.

The origin of the child is defined according to the requirements of the Family Code (SG/28.05.1985, last amendment 20.07.2007). The Code distinguishes between origin from the mother and from the father in Article 32 and 33. The origin from the mother is determined by birth, valid also in cases where the genetic material belongs to another woman. The father of the child is defined as the husband of the mother when the child is born during the marriage or not more than 300 days after the marriage has been dissolved if the mother has not remarried by the end of this period. If the mother has a new husband he becomes the father of the baby. The disputing of fatherhood is permitted, but not in the cases when the mother with the consent of her husband, put in writing and filed with the manager of the respective establishment, has been artificially inseminated or has given birth to a child conceived with genetic material from another woman (Art.33:4). An interesting example of this regulation is presented in Case Study 2 at the end of the Report.

If only the mother of the child is known the second and last name of the child are formed after the name of the mother, or her father (last name). If the mother is not married to the father he has to inform the authorities that he is the father, the so-called ‘recognition of the child’. If this is done before the birth certificate is issued, and if the mother agrees, the

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<sup>8</sup> Unified Civil Number (Единен граждански номер, ЕГН) consists of 10 digits, including the date of birth and 4 additional digits. This number is unique for each person and is used for identification.

name of the father is written on the birth certificate. If the child is 'recognised' later the name of the father is put on it under 'Notes'. A new birth certificate, however, is issued after full adoption, where the name of the adopter is written as a parent, a new personal number is given but the actual date of birth is written.

The origin of the child is important also in relation to leaving the country. Children under the age of 18 can leave the country only if they are accompanied by the two parents. If the child is travelling alone, with only one of the parents, or with a third person the parent who is not present has to provide a notary verified declaration of agreement for the travel of the child (Ministry of Foreign Affairs, 2008).

### **1.6.3. What is the law concerning abortion? Give a brief history.**

At present abortion is regulated by Decree No. 2 on the Conditions and Procedures for the Artificial Termination of Pregnancy of that came into power on the 1 February 1990. The law introduces the term 'abortion', which is used instead of the phrase 'artificial termination of pregnancy'. According to this Decree abortions can be carried out on request and on medical indications, and can be performed on Bulgarian citizens, foreign citizens, and women without citizenship who are allowed to live in Bulgaria.

Incapacitated women can have an abortion only if their legal representatives or guardians manifest agreement. The grounds for abortion can be the following: to save the life of the woman; to preserve physical health; to preserve mental health; rape or incest, foetal impairment; economic or social reasons.

According to Art.5:2 women had to pay fee for abortion, except in the following circumstances: the abortion is performed due to medical indications; the pregnancy is a result of rape; the woman is under the age of 18. This paragraph was revoked in 2000. At present the Health Insurance Fund pays only for abortions for medical reasons and rape (Health Insurance Law, Art. 45:7). Abortion on request is available to any woman who: is not more than 12 weeks gestation; does not suffer from an illness which her abortion may

aggravate, thus endangering her health and life.

When a pregnant woman who wants to terminate her pregnancy goes to the local medical practice her GP is obliged to establish the term of the pregnancy and the absence of medical contraindications for an abortion; to carry out the necessary tests within 10 days of her request; and providing that there are no conditions preventing the abortion, the GP needs to send the woman immediately to a hospital. Abortions must be performed in state or private specialized obstetric/gynaecological clinics or such departments by specialists. If an abortion is performed outside of hospital the person carrying out the abortion can be imprisoned for up to 5 years, or up to 8 if he/she holds a medical degree (Penal Code, Art. 126). The mother is not charged in these circumstances.

A medically indicated abortion is performed on the request of the pregnant woman if she suffers from an illness proved beyond any doubt, which during pregnancy or at birth may endanger her health and life, as well as that of the offspring. Appendix 2 of the Decree No. 2 on the Conditions and Procedures for the Artificial Termination of Pregnancy (1990, last amendment 2000) contains a list of illnesses of the woman when abortion for medical reasons is allowed. It contains both physical and psychological conditions amongst which epilepsy, diabetes, syphilis, AIDS, polio, hepatitis, different sorts of psychosis. Abortion due to illnesses of the mother is allowed if the pregnancy is not more than 20 weeks' gestation. If the pregnancy has lasted more than 20 weeks, the abortion is allowed only if the woman's life is in danger or in the case of severe morphological changes or if the fetus is severely genetically harmed. On discharge from the hospital doctors always give instructions on how to avoid future unwanted pregnancies.

Before this Decree came into power there was a restrictive policy on abortions in Bulgaria<sup>9</sup>. Abortion has been legal in Bulgaria since 27 April 1956, when the Ministry of Public Health issued instructions providing that all women wanting to terminate a pregnancy had the right to do so if their pregnancy was of less than 12 weeks' duration

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<sup>9</sup> The history of abortions is taken from the United Nations Population Division Department of Economic and Social Affairs (2002)

and they had not had an abortion within the previous six months. After 12 weeks of pregnancy, abortion was permitted only on therapeutic grounds. Abortions had to be performed in authorized hospitals.

Brunnbauer and Taylor (2004) comment on the popularity of abortion in the following way:

The operation was easily accessible and relatively cheap, and due to the widespread lack of contraceptives abortion became one of the main means of preventing undesired births. Modern contraceptives were not introduced in Bulgaria, and although pills and IUDs were imported from other socialist countries and were freely and cheaply sold at pharmacies, supply was erratic (Brunnbauer and Taylor, 2004: 303)

In response to declining birth rates and rising abortion rates surpassing birth rates, the Government of Bulgaria restricted access to abortion in February 1968 (Decree No. 188 of the Ministry of Public Health and Social Welfare). Abortion was prohibited for childless women except when medically indicated or in the presence of special circumstances of a grave nature. Women with only one or two children were to be actively discouraged from aborting, although they were to be given approval by a special medical board if they persisted. A special board could give approval when the pregnancy was the result of rape, when the woman was under 16 years old (subject to parental consent), when she had been made pregnant by a person whom she could not marry because he was a close relative or when there were serious social indications. Women over 45 years of age or those with at least three children could obtain an abortion on request. However, an abortion could not be obtained on request if the pregnancy was of greater than 10 weeks' duration or the woman had obtained an abortion within the prior six months. An abortion was to be authorized by a special board for medical reasons (including foetal defect) at any time during pregnancy.

In April 1973 the restrictions were extended (Decree No. 0-27 of the Ministry of Public Health), denying not only childless women, but also women with only one child access to abortion. Exceptions were made only in the case of rape or incest; if the woman was an

unmarried person under the age of 18 with no living children; if she was over 45 with at least one living child; or if a disease endangering the life of the woman or the viability of her offspring was present.

According to Brunnbauer and Taylor (2004, p 304) these changes happened in spite of the disapproval of the female members of the Central Committee of the Bulgarian Communist Party and were met with a negative response from the public. The authors also suggest that the following liberalisation in the law was prompted by the negative reaction of the public and the resistance of medical practitioners who disapproved of the politicisation of the female body. The law was slightly liberalised in 1974 when all women could present their case in front of the commission and permission was given more often (Brunnbauer and Taylor, 2004). Unmarried women were allowed to have an abortion regardless of parity. Termination of pregnancy on request could only be performed if the duration of the pregnancy did not exceed 10 weeks at the time the examination was performed. Abortion law was liberalised again until the fall of the socialist government (1989) making it available to all women upon request, up to 12 weeks gestation.

Debates on abortion in Bulgaria since 1989 have predominantly focused on its traditionally high rates and ways to reduce them through contraception and sex education, and not on restriction of abortion rights. According to a Report of the Ministry of Health (2004) there is 'a new alarming tendency' – an increase in abortions to young women aged 15-19. The main reasons for the current situation of very high abortion rates that have been identified by the report are the 'low health and sexual culture of the population and comparatively high prices of the contemporary hormonal contraceptives' (Ministry of Health, 2004, p 39). The debates and policy measures focus on the necessity of sexual and reproductive education of the population.

Coercive sterilizations are not part of the history of Bulgarian law, unlike other post-socialist countries, for example the Czech Republic and Hungary (European Roma Rights

Centre, 2007).

#### **1.6.4. Is there policy/ public debate around teenage pregnancy?**

Teenage pregnancy is one of the key problems related to the high rate of maternal mortality identified by the National Health Strategy 2007-2013 of the Ministry of Health (2007). The rate of mortality of mothers is 1.0% in 2004, almost double the EU rate. The Report of the Ministry of Health (2004, p36) suggests several 'alarming trends' in behaviour of young people that have negative influence on their reproductive health: first, decreasing age of the first sexual contact. According to the data published there, the relative share of young people who had their first sexual intercourse under the age of 16 has increased 12 times and in 2000 41% of children have had sex at 16; second, there has been an increase in sexually transmitted diseases among young people: 36.7% of all people suffering from syphilis in 2001 were children under 17 and 95% of the newly found gonorrhoea cases were youngsters; and third, there is a very high number of unwanted pregnancies among underage girls often resulting in abortions. Teenagers and young people have also been identified as one of the groups at risk from AIDS and STDs (together with drug addicts, prostitute women and men, 'men who have sex with men', and the Roma population) in the *National Programme for Prevention and Control of AIDS and Sexually Transmitted Diseases 2001-2007* (Ministry of Health, 2007).

Teenage pregnancy in Bulgaria is declining, according to the statistical data provided by TransMONEE (UNICEF, 2007). The share of births to mothers under the age of 20 (15-19) as percentage of all life births was 20.9% in 1989. In the following years it was rising and reached its peak in 1997 – 22.6% but it has been declining since. In 2005 the percentage of babies born to teenage mothers was 14.2%, however, many young women choose to terminate their pregnancy and therefore the actual scale of the problem with the teenage pregnancy becomes more visible when number of teenage abortions is brought into consideration. According to the Ministry of Health (2004) in 2003 there were 159 abortions to women under the age of 15, 52 from them were upon request; and 4686 abortions of women aged 15 to 19, 3003 from them performed upon request. The

proportion of abortions for women under the age of 20 in 2003 was 10.1%. The majority of the abortions were for women between 20 and 29 – 53.1%.

There have been a few programmes dealing with reproductive health of young people and teenage pregnancy. An initiative ‘Development of National Programme for Reproductive Health’ took place between 2000 and 2004 which included education and training of health professionals, teachers and young people, and local initiatives for prevention of ‘risk sexual behaviour’ of teenagers (Ministry of Health, 2004). Another four-year programme started in 2004 on ‘Improvement of Sexual and Reproductive Health of Young People in Bulgaria’ implemented by the Ministry of Health, The Ministry of Education and Science and the United Nations Population Fund (UNFPA). This programme is focused on children and young people aged between 10 and 24 and its aims include: creating knowledge, skills and attitudes for ‘responsible reproductive behaviour’; increasing young people’s access to healthcare and reproductive services; reducing pregnancies, abortions and birth of women aged 15 to 19; increasing the number of young people who use condoms; raising awareness of people aged 15 to 24 about sexually transmitted diseases. The activities include: summer schools, training and information campaigns, school clubs and centres for reproductive health, dissemination of information materials (Ministry of Health, 2004).

### **Roma women**

The discussion of teenage pregnancy among Roma women is one of the key issues in the general teenage pregnancy debate. Quite often it is framed as a problem by the government. For instance, the European Roma Rights Centre (2006) published material on the proposal of the Bulgarian Health Minister for a ban on births to women under the age of 18 as a measure to eradicate teenage pregnancy problem. He also suggested that this law will affect mostly Roma women. According to the comments of the Centre ‘Dr Gajdarski’s announcement provoked a strong negative reaction by Bulgarian parliamentarians, who stated uncategorically that such a measure would never be implemented in Bulgaria’ (European Roma Centre, 2006).



There was a Programme 'Reproductive Health. Health and Sexual Education of Roma Population in Bulgaria' that took place between 1998 and 2000. The programme was financed by EU – PHARE Lien Program of the European Union and implemented by the NGO Bulgarian Association for Family Planning and Reproductive Health. The organisation received an award for this initiative in 2001 by the Delegation of the European Commission at the National Competition "At the edge of Europe" (Ethnos BG, no date). The initiative included education, training and establishment of three reproductive health centres in Roma communities.

#### **1.6.5. Is there policy/ public debate around 'delayed motherhood'?**

'Delayed motherhood' seems a problematic term in relation to circumstances in Bulgaria. The mean age of mothers at first birth is traditionally low in comparison to other European countries and although it has been rising (it was 22 years in 1989 and 24.3 in 2003 according to UNICEF, 2005) it is difficult to argue that there is 'delayed motherhood'. The debates are mostly about the low birth rates and the rising age of having a first child is one of the facts mentioned. However, this is not seen as problematic on its own. There is no policy in relation to 'delayed motherhood'.

#### **1.6.6. Is there any policy/ legislation defining an 'appropriate' age for motherhood?**

There are medical terms referring to appropriate age for having a first child, or more precisely categories for inappropriate age. A list of International Classification of Diseases published by the National Centre for Health Information has a section on observation of the course of pregnancy of women at high risk. This section identifies several types of women at high risk among which: observation of an 'old first-timer' and observation of a 'very young first-timer'. This document however does not specify any concrete age related to the categories. I have not been able to find a document specifying

clearly these age groups. However, in an interview for newspaper 'Standart' (21.01.2003) Dr. Doganov, the Executive Director of the biggest birthing hospital 'Majchin Dom' ['Mother's Home'], explains that a 28-aged women who is pregnant for the first time would be considered an 'old first-timer' according to classical midwifery. A NGO 'Zachatie' [Conception] that offers support for women suffering from infertility has a section on 'late first pregnancy', where they comment the appropriate age for birth and argue that until recently a definition of the 'old first-timer' existed for a women aged 28 or more, which was not based on any scientifically defined criteria (Zachatie, no date). Another way to approach this question would be to look at the fertility treatment programme of the Ministry of Health where only women aged 18-40 are entitled to participate.

#### **1.6.7. How are adoption and fostering regulated? (by the state or private agencies?)**

The adoption process is fully regulated by the state through registration of the children to be adopted, registration of the adopting parents from abroad, giving licence to agencies and making decisions about adopting children abroad. There is a court procedure for adding children to the register. There is a minimal period of four days after the birth of the child, before which the mother is not allowed to agree to the adoption of her child (Family Code, Art. 54: 3 introduced in 2003).

A person willing to adopt a child under the conditions of full adoption needs to get a permission to enter the register from the Directorate 'Social Assistance'. The Directorate carries out a study about her/ his suitability to adopt a child. The gathered information is in the following areas: identity of the prospective adoptive parent; health status; family of the prospective adoptive parent; personal data of the members of his/her family as well as data about their health status; economic and social situation of the prospective adoptive parent; reasons for the adoption; other circumstances that are of importance for the adoption (Art.57a: 3). The decisions about the adoptions are made by the Council for

Adoption at the Regional Directorate of Social Assistance. Under article 67b the adoptive parents or the adopted person who has come of age can ask the district court that ruled the decision for admission of the adoption to provide them with information about the origin of the adopted child when important circumstances require so.

In relation to citizenship the Bulgarian Family code is in force if one of the persons taking part in the adoption is a Bulgarian citizen. The consent of the Minister of Justice is required and the adoption is performed by a Bulgarian court (Art. 136:1). The law permits a foreign citizen to adopt a Bulgarian citizen over the age of one year if the adopting person presents adoption permission issued according to the law of their native country (Art. 136:2). In special circumstances, to the benefit of the child, the adoption can happen before one year of age. There is another requirement for adoption by a non-Bulgarian citizen: if six months after registration of the child for adoption there have been three people who have been allowed to adopt the child but none of them has filed a request to adopt, or if an appropriate adopting person has not been identified, the child meets the requirements for foreign adoption (Art. 57B: 9).

The Ministry of Justice keeps a separate register of children who can be adopted by foreign nationals and another one for non-Bulgarian citizens willing to adopt a Bulgarian child. To be included in this register adopting parents with foreign nationality have to submit an application for adoption of a child with Bulgarian nationality, after which a procedure of verification of the compliance with the regulatory requirements is carried out before the person can be included in the register.

It has to be taken into account that there are many candidates willing to adopt a child with Bulgarian nationality who are recorded in the register of the Ministry of Justice. [...] in considering the file of a child, a suitable family is sought for it, all families, having submitted an application for adoption of a child and having identical characteristics to its, are assessed.' (Ministry of Justice, 2007, my translation)

Article 182a criminalises acts of interceding between a person and a family wishing to

adopt a child, and a parent wishing to abandon his child, or a woman agreeing to carry in her womb a child for the purpose of giving it up for adoption if there is financial benefit from this. A new article that came into force in 2006 defines a punishment of a woman (but not the man) who agrees to sell her child as imprisonment for a period of one to six years and a fine (Art.182b).

Fostering is regulated by the Law on Protection of the Child. According to this a foster family is 'two spouses or a person' (Art.1) who care(s) for a child but do(es) not have parental rights. The foster family can be professional (new article in force since 2007), and in this case additional qualifications for raising children are required. Underage people or people who do not have the ability to perform parental functions due to lack of personal qualities for raising a child or lack of material conditions cannot become foster parents. There are no requirements linked to marital status or sexual orientation.

According to the law, the foster family or the family of relatives raising the child are obliged to give the parents information about the child and to assist the personal relations between the child and the parents if these are in favour of the child. The aim of the policy is for children to be brought up in a family environment, which is described as the biological family of the child, or the adopting family, grandparents or close ones, or a foster family.

#### **1.6.8. Who can adopt (married couples, single women/ men, cohabiting couples, same-sex couples)? Is there adoption leave?**

There is no text in the legislation that does not allow single or cohabiting people, homosexual or heterosexual, to adopt children. However, if a couple wants to adopt a child, they have to be married. Family environment/ history and experience as a parent are considered, together with social and economic status, etc. The exact criteria about the necessary qualities are not defined as the legislative and policy documents refer to 'child's best interest', 'suitability for parenthood', and 'match' between the

characteristics and needs/demands of the child and the adopting parent but these categories are not explicitly defined. There is also no information published on the marital, social, economic status of the people who have adopted children. There is only information about the children who are registered for adoption. Therefore, it is difficult to know who has been allowed to adopt.

There is more detailed information on international adoptions. For example, among the documents proving the suitability of the adopter there are two certificates - for mental and for physical health. The doctor examining the person willing to adopt a child has to certify that: the patient is in a good physical health and does not suffer from any serious chronic diseases, contagious venereal diseases, tuberculosis and other diseases that are a menace to his/her life, and also that the results from the serological tests for HIV are negative. The mental health certificate contains the conclusion of the doctor that the patient is in a good mental health and is suited to adopt a child outside the country. (Ministry of Justice, no date).

However, the proportion of the number of people who want to adopt a child to the number of children available for adoption is sometimes as high as 10:1, which means that there are many people willing to adopt 'competing' for one child (Ministry of Justice, 2007) and therefore a notion of the most suitable parent can be quite discriminatory.

<b>Report on the Intra-country Adoptions Council Activities</b>					
<b>(Source: Ministry of Justice)</b>					
	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007 (Jan-Sept)</b>
Considered files of prospective adoptive parents	80	319	446	252	232
Considered files of children	85	262	165	94	83
Number of children with approved cases for adoption	78	240	163	91	81

A person can be adopted if he or she is not 18 or more years old at the time the documents are filed and if s/he is included in the adoption register. There is a minimal

age difference of 15 years between the adopting person and the adopted, unless the adopted is a child of the spouse. The consent of the following people is necessary for an adoption: the adopter, the parents of the adopted, the spouse of the adopter and the spouse of the adopted, the adopted if he or she is 14 years of age or older.

The law distinguishes between two types of adoption – full and incomplete. Full adoption is compulsory in three cases: when the parents of the person to be adopted are unknown, when they have left him/her in a specialized institution with consent for full adoption, or when the child has not been asked for by the parents within six months of being left in the institution. In all other cases there is incomplete adoption when the rights and obligations between the adopted and his descendants with their relatives by origin are retained, but there are rights and obligations as between relatives by origin between the adopted and his descendants, on one hand, and the adoptive parent, on the other.

The Bulgarian LGBT organisation Queer Bulgaria published on its webpage the results from a study carried out by newspaper ‘Capital’. According to the information from newspaper, the Agency for Protection of the Child had confirmed that according to Bulgarian legislation homosexual orientation cannot be an obstacle for adoption. ‘In the selection of appropriate candidates for adoption the interest of the child is leading. The best family for the child has to be found’ was explained from the agency. In spite of that, many of the homosexuals who were interviewed by the newspaper were afraid of indirect discrimination because the legal procedure for adoption allows subjective judgements to be made (Queer Bulgaria after newspaper ‘Capital’, 18.05.2006).

The first 315 days of maternity leave are called ‘leave due to pregnancy, maternity and adoption’ and adopting mothers are entitled to them if the child is 315 days old or less. According to the Labour Code, mothers who have adopted children have the right to maternity leave and generally have the same rights as biological mothers as they fall into the category of ‘women taking care of children’, which is the expression used in the law. The leave for raising a child is available not only to (adopting) mothers, but also to the fathers (adopting fathers) or the parents of the above two. In these cases the agreement of

the mother is required (Art. 167). The paid leave is until the child is 2 years of age, and then it can be continued by 1 year of unpaid leave until the child 3.

The Bulgarian adoption system has been hugely criticised for its ineffectiveness. This can be illustrated by the evaluation of the Foreign and Commonwealth Office (United Kingdom):

Child protection requires further efforts. Although the number of foreign adoptions is falling and the number of domestic adoptions rising, the number of institutionalised children remains high. A key reason for this is the lack of an integrated national system, which would enable parents from one region of the country to adopt children from another. (Foreign and Commonwealth Office, 2007, no page)

#### **1.6.9. Proposed changes to the Family Code**

The proposed new Family Code that has already been discussed in relation to marriage and cohabiting would also influence adoption procedures. There would be some significant changes that would make the procedure more flexible, quicker and would better protect the rights of children. For example, if a child is adopted by a guardian, a trustee, a foster family, or a family of close people or relatives with whom the child lives under the Law on Protection of Children there would be no need to include the adopting parent/s in the register, as is currently the case. Another important change would be that the new law would provide for adoption without the agreement of the parents. This could happen when the child has been in an institution for 6 months and the parents have not looked for him/her without an important reason, or when the parent has not asked for his/her parental rights to be restored. The Ministry of Justice would have to take additional measures for the adoption of children with special needs, health problems, or children who are over 7 years of age. The Ministry would have to publish information about such children on its web page and if there have not been any requests for adoption within 1 month it would have to inform the central bodies for international adoption.

According to the present legislation twins have to be adopted together but the new Code would allow them to be adopted separately if their interests require this, and with proof that they had not been adopted together after 6 months. Siblings can be adopted together if they have an emotional bond between them. A new national electronic system of children available for adoption through the Agency for Social Support would be created.

The introduction of de facto cohabitation into legislation is also considered in relation to adoption. The partner in a registered de facto conjugal cohabitation would be able to adopt their partner's child in the same way that a spouse can. The procedure for researching the adopting parent would become more thorough and would take at least two months, while at present there is no minimum but a maximum length of the procedure, which is not more than 3 months. The agreement to adoption could be given by the mother not earlier than 30 days (previously 14) after birth.

There are proposed changes in court procedures, for example if the opinion of the biological and adopting parent is asked for by the court this would be done in separate sessions (96: 3), while currently it can be done in the same session which can create tension and conflict of interests. The procedure for choosing of an adoptive parent is now based on 'his/her ability to meet the needs for upbringing and education of the specific child, ability to provide physical, psychological and social wellbeing, preferences, and all circumstances related to the interest of the child' (Art. 100:1). Currently the choice is based on the number on the register, their qualities, and whether the person had been given another child but did not reply in time. The new text emphasises the children's interests much more than the old one. The administrative work on the documentation would be sped up by a new deadline of 3 days within which the social services have to send the documents to court. The court procedure would include consideration of the Reports from Direction Social Support.

The proposed new version of the Family Code would give adopted children the right to request information about their origin after they reach 14 years of age. Currently they



have to wait until they are 18 and are allowed to request this information only if important circumstances require this. Another novelty in the legislation is foster parenting. It is phrased as ‘replacment care’ and according to the Code foster parents would not acquire parenting rights, the child has to live with them and they are responsible for the child’s health, education, civil status, ID documents issuing.

**1.6.10. Does the state provide access to assisted conception (donor insemination, IVF etc)? If so, for whom (married couples, single women, cohabiting heterosexual couples, lesbian couples)?**

The Bulgarian state allows access to assisted reproductive technologies. According to the Health Law (2005, Art.129) ‘assisted reproduction is done only when the condition of the man or the woman does not allow the fulfilment of their reproductive function in a natural way’. This means that any woman who would want access to assisted conception would have to prove to be physically unable to become pregnant (without treatment). Other requirements include: obtaining of written consent of the people desiring to have offspring (Art.130); that medical tests do not find any diseases that will harm the health of the offspring.

The same law regulates the donation of ova or sperm. In the case of donation, the donor has to be of full legal age, he/ she has to be informed in an acceptable language about the risks and has given a notarized written consent, a commission of three or more doctors provides a protocol for the physical and mental health of the donor. A new article on this Law that came into force in 2006 criminalises the giving or receiving of financial stimuli for sperm or ova donation (Art. 98:7). The use of reproductive material from blood relatives of direct descendent or indirect descendent up to 4<sup>th</sup> level is also not allowed (Art.133).

A new fertility programme partly subsidised by the Government started in February 2005, which gives women access to infertility treatments such as: IVF, Intra-Cytoplasmic

sperm injection (ICSI), embryo transfer and artificial insemination. 1270 women were included in 2005, 1500 in 2006 and 1200 in 2007 (Zabremenqvine, 2007). The government covers the cost of only one procedure and if more are necessary they have to be paid by the patient. The criteria for inclusion in the programme include some specific medical requirements but also the following: sterility that continued for more than 1.5 years if the woman is 34 years or less and 12 months of unsuccessful infertility treatment with other conventional methods; sterility that continued for more than 6 months if the woman is 35 years or more and 6 months of unsuccessful infertility treatment with other conventional methods. Only women aged 18 to 40 are entitled to participate in the programme. The two partners participating in the programme are tested for: HIV, Wass (syphilis), HBsAg (Hepatitis B Virus), HCV (HepatiTis C Virus) (Zabremenqvine, 2007).

According to the information provided by one of the clinics participating in the programme, it is not necessary to be married to your partner or even to have a partner to take part in the program (Centre for Reproductive Health 'Nadejda', no date), which does not correspond to the regulations of the Health Law and the requirements of the programme. However, the practices in private clinics seem to differ from the strict provisions of the law. This means that in practice single women or women in homosexual couples can have access to assisted reproduction although they do not have medical conditions preventing them from 'natural' conception.

#### **1.6.11. Is there legal regulation of private provision of assisted conception? If so, what is the nature of the regulation?**

There is no distinction between state and private clinics in the legislation, the regulations are universal. Nevertheless, there is no consistency between legislation and practice as it was mentioned earlier. It can be expected that the private clinics are more 'open-minded' about the way they implement the law, and that the state control over them is more difficult.

#### **1.6.12. What is the law concerning surrogacy?**

In Bulgaria there is no law regulating surrogacy. The Family Law provides that the mother of the child is determined by birth, even in the cases where the child is conceived with genetic material from another woman (Art. 31). This means that the surrogacy has to include a process of adoption of the baby, because legally the baby will belong to the mother who gave the birth. Having said that, surrogacy is not illegal because there is no law that forbids it. However, it is not legal to offer financial reward to a woman to give her baby away.

## **1.7. Homosexuality and Anti-Discrimination Legislation**

### **1.7.1. Is there law against discrimination on the grounds of sexuality/ against lesbians and gay men? What is the history of the legislation, and its provisions? (e.g. does it relate to employment, the provision of goods and services etc?)**

A new *Law on Protection against Discrimination (2004)* was adopted in 2004 and is one of the few that mention sexual orientation explicitly. The stated purpose of this law is threefold: to ensure each person's equality before the law, to ensure the equal treatment of individuals and equal opportunities for participation in public life, and to guarantee effective protection against discrimination. The law includes all aspects of possible discrimination mentioned in the Constitution, such as discrimination on the grounds of sex, race, nationality, ethnic origin, origin, religion or belief, education, opinions, political belonging, personal or public status, property status. Some 'new' aspects have been introduced into this law, which are citizenship, disability, age, marital status, and also sexual orientation, which here is explicitly mentioned. The law defines discrimination as direct and indirect. However a few cases are stated not to be considered discrimination; these are stated in Article 7 of the law. For example, this article allows the different treatment of persons on the basis of a characteristic, related to any of the grounds mentioned above,

‘when the said characteristics, by the nature of a particular occupation or activity, or of the conditions in which it is carried out, constitutes a genuine and determining professional requirement, the objective is lawful and the requirement does not exceed what is necessary for its achievement’ (Article 7).

This text allows some occupations or activities to be open to discrimination (for instance age discrimination for fashion models) but the law does not explicitly define which professions. The law also allows the burden of the proof to be in favour of the victim and the defendant party must prove that the right to equal treatment has not been infringed. The law offers protection of rights the areas of employment, education and training,

provision of goods and services. The balanced participation of men and women in governance and decision-making is to be encouraged, according to the law, as well as representation of ethnic, religious or language minority groups. Sexual minority groups are not mentioned here.

This is the first law in Bulgaria to give legal definition of ‘harassment’, ‘sexual harassment’, ‘persecution’ (‘victimisation’), ‘instigation to discrimination’, ‘racial segregation’, ‘less favourable treatment’ as acts leading to discrimination (Commission for Protection against Discrimination, 2006). The Law is called ‘revolutionary for the Bulgarian judicial system’ (Mihajlova, 2006, p1) because it shifts the burden of proof and because it allows legal non-profit entities to initiate court cases and to be plaintiffs in cases when there are several victims. An example of these is the court case described in the first case study at the end of this chapter.

- Commission for Protection against Discrimination (CPD)

The Commission is created under the LPD law as an independent specialised state body for the prevention of discrimination, protection against discrimination and ensuring equal opportunities. It reports its activities annually before the National Assembly. The participation of women and men and of ethnic minorities in it is to be protected, but again no requirements to include people from sexual minorities are stated. At the same time the law explicitly states that at least four out of the nine members of the Commission should be jurists, and all with minimum higher education attained.

According to the Annual Report of the Commission (2006) 389 complaints and signals were received during 2006. From these seven were on the grounds of sexual orientation. The investigations of the commission resulted in the conclusion that in only one of these seven cases has there been discrimination. Another two cases were based on discrimination on multiple grounds including sexual orientation. There is an increase in the overall number of cases reported to the Commission in comparison to the previous

year: in 2005 there were 194 cases altogether.

One of the cases of discrimination in 2006 was in relation to material published in the left-wing newspaper 'Duma' (28.12.2005 cited in BGO 'Gemini', 2005) dedicated to 'Gay Culture'. The material contained homophobic statements and was reported to the Commission by the Bulgarian Gay Organisation 'Gemini'. The organisation and the newspaper reached an agreement that an apology would be published and the paper would not distribute any more homophobic materials (BGO 'Gemini', 2005). In another case a 22 – year old gay man from Albania was arrested and harassed by the police. The Commission decided that 'there was unwanted behaviour which had either the aim or result of offending the dignity of the person and of creating a hostile and offensive or threatening environment'. The defendant was fined. The third case was related to the banning of an event of BGO Gemini by the municipality of Varna. The Commission decided that the argument for the refusal of the event seem to be neutral but in practice had led to less favourable treatment. The municipality had to pay fine of 500 Bulgarian leva.

The effectiveness of the Commission has been criticised by members of the NGO sector. For example, the Bulgarian Helsinki Committee, in its report on *Human Rights in Bulgaria* (2007), stated that the Commission against Discrimination did not start working until 2006 although the law became into power in January 2004 and its activities are described as not completely efficient. The most rigorous criticisms are regarding the inability of the members of the Commission to distinguish between the different forms of discrimination, including direct and indirect, and between discrimination and other forms of unlawful behaviour which results, according to the report, in 'dilution of the concept discrimination' (Bulgarian Helsinki Comettee, 2007: 30).

- Sexuality in Other Legislation

*The Constitution* (1991) at present does not include sexuality as grounds for discrimination. The formulation is: 'all persons are born free and equal in dignity and

rights. All citizens shall be equal before the law' (Article 6). The constitution does not allow any privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status. There have been several occasions when debate about the necessity of the changes in the Constitution was initiated. In 1992 after a suggestion from the President, the Constitutional Court revised the grounds of discrimination and the conclusion was that: 'the social grounds on which discrimination or privilege are not allowed are exclusively mentioned in article 6' and changing these grounds will create discrimination against or privileges for some social groups (cited in Huf and Stoichkova, 2006, p 6).

New discussions in Parliament were initiated in relation to Bulgarian EU accession. There is concern that the grounds of discrimination in the Constitution do not correspond to the Charter on Human Rights. The discussions are based around the question of whether the grounds in the Constitution have to be expanded or the membership will be enough for the direct implementation and protection of these rights (Temporary Commission for Preparation of Proposals for Changes in the Constitution, 2004). A report submitted by the working group 'Necessity for Constitution Changes' formed at the Ministry of Justice recommended changes in accordance with the EU law in the Chapter of Fundamental Rights. According to the report of the Working group, the basic rights stated in the Constitution have to be extended to include genetic features, language, membership of a national minority, disability, age, and sexual orientation.

The proposed changes would make the Constitution compatible with the Charter of Fundamental Rights of the European Union (2000/C 364/01) where in article 21 states that:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (Euro Parliament, 2000: 13)

However, no changes in this direction have been made so far. Discrimination on the grounds of sexuality is also covered in other pieces of legislation, such as:

- *The Labour Code* regulates labour relationships between employees and employers, as well as other relationships immediately related to them. Article 8 of this law (in force since 01.08.2004) prohibits discrimination based on many grounds among which sexual orientation, sex, race, skin colour, age, are explicitly mentioned. The law states that ‘during the exercising of labour rights and duties no direct or indirect discrimination shall be allowed’ (Art.8) [my translation].
- The *Health Law* (SG 70/10.08/2004) states that the principles of provision of healthcare are: equality in the use of healthcare; provision of accessible and quality healthcare, with priority for children, pregnant women and mothers of children up to one year old (Art.2). Article 85 provides for the assessment of the patient’s health condition, which cannot be based on sexual orientation, and also on race, sex, age, ethnic belonging, origin, religion, education, cultural level, beliefs, political belonging, personal and social status, and property status.
- According to the Bill on the Rights and Obligations of Patients (2006) every patient has the right to be respected as a person, to be treated with humanity and respect of his/ her dignity (Art. 5). Every patient has the right to self-definition (Art. 6), physical and spiritual wholeness, personal safety, and protection from economic, sexual or other form of exploitation, from physical and moral abuse and humiliation (Art. 7) and respect for her/ his personal life, moral and cultural values, and religious beliefs (Art. 8). The right to personal (intimate) sphere while treated in hospital is also recognised by this law (Article 27: 2). The same law grants the right to personal life and confidentiality (Art. 85), and to support from family, relatives and friends (Art. 56:1) while in hospital care. Access to healthcare institutions is equal for everyone (Art.30: 2), patients with HIV, AIDS, with infectious diseases or mental disabilities have the same rights to health treatment and respect for their human dignity (Art.30: 3).



- The *Professional Ethics Code* (SG/79/29.09.2000) proclaims the necessity for respect of the intimate sphere of patients (Art. 27). Among the values of the doctors' profession are: tolerance of religious beliefs, ethnic traditions, political orientation and affiliation (Art. 2:7); equal attitude towards patients with different social and material status (Art.2:8). Interestingly tolerance of different sexual orientations is not included. The code also states that all doctors have equal opportunities for practicing the medical profession, preparation and improvement regardless of their race, religion, origin, sex, age or political affiliation (Art.7). Doctors have the right to refuse to perform an abortion in cases of normal pregnancy due to his/ her moral, religious and other beliefs (Art.32).
- According to the provisions of the *Judicial Ethics Code* (SG 60/22.07.2005) lawyers in all their actions cannot discriminate on the grounds of sex, sexual orientation, family status etc.
- The *Employment Promotion Act* came into power in 2002 and according to it no direct or indirect discrimination, privileges or restrictions are allowed based on sexual orientation, sex, ethnicity, origin, race, colour of the skin, age, political or religious affiliations, membership in trade unions and other public organizations and movements, family, social or property status, or on the basis of mental and physical disorders. The same law prohibits the establishing of conditions for employment applicants related to sex, age, nationality, ethnicity, and health status. The omission of sexual orientation here means that it is not against this act to announce a position for heterosexual people only. This however, will be considered discrimination under the general provisions of the act or the Law on Protection against Discrimination. Still, the omission is important because it makes the legislation unsystematic.
- The *Social Security Act* (SG.110/17.12.1999, last amendment SG.12/13.02.2004) has similar general provisions that do not allow insurance companies to refuse

additional voluntary insurance to individuals based on numerous grounds among which are sex and sexual orientation (Art.283).

- Sexual orientation and sex are explicitly mentioned as grounds on which discrimination or privilege is not allowed by the *Regulation of the Procedures for Selection of State Servants* (SG 6/23.01.2004) [Наредба за провеждане на конкурсите за държавни служители]. According to it all candidates need to have equal access to state positions.
- The *Law on the Ombudsman* (2004) came into force in January 2004. The Ombudsman intervenes when citizens' rights and freedoms have been violated by actions or omissions of the state and municipal authorities and their administrations, or by the persons assigned with the provision of public services (Article 2). The law explicitly states who can submit complaints and signals in the following way: 'natural persons, irrespective of their citizenship, sex, political affiliation or religious beliefs'. There is again omission of overt mentioning of sexuality.
- In the *Criminal Procedure Code* (SG 86/28.10.05, last amendment June 2007) there is a general provision of anti-discrimination through the formulation: 'All citizens who take part in criminal proceedings shall be equal before the law' (Art.1) and 'the court and pre-trial bodies shall proceed accurately in applying the law equally to all citizens' (Art.11). However, in the explicit mentioning of ground of discrimination or privilege sexuality is not mentioned.
- The NGO Queer Bulgaria suggest that the procedures of the *Pre-Army Commissions* still treat homosexuality as 'diversion' based on the old formulation of the medical standard which is still in power (Queer Bulgaria, 2004). At present the procedures create curious situations of false/ pretended homosexuality where heterosexual men pretend to be homosexual during the health expertise of the Pre-

army Commission, so that they will be freed from military service<sup>10</sup>. The health examinations include tests for AIDS and Syphilis, examinations for mental disorders and for haemorrhoids (Regulation of the Conditions, Sequence and Organisation of the Military Health Expertise, 2005, SG 24/22.03.2005).

### **1.7.2. Is there recognition of the problem of anti-gay violence/ hate crimes? Are there policy initiatives to combat it?**

There is very little discussion of anti-gay violence and no policy initiatives whatsoever to combat it, or even to raise awareness of it. In a special report on the Bulgarian Legislation about Homosexuals (2001) The Bulgarian Helsinki Committee points out that homosexual people are victims of police violence but no record of this is collected. Some of the discriminatory practices of the police include: collection of personal information from homosexual victims of violence that does not relate to the case; police officers refuse to register acts of violence towards homosexual people; there are unprovoked actions of the police in clubs that are frequented by homosexuals. More recent reports of the Committee (2007) outline violence in prisons and during arrests as some of the most significant violations of human rights in Bulgaria. However, all examples relate to ethnic minorities and not to anti-gay violence.

Violence is a topic raised by Bulgarian LGBT organisations. The Bulgarian Gay Organisation 'Gemini' published material about meetings of LGBT people in several towns in the country where violence was one of the main topics rising from the discussions. The comment on the situation is that 'it was very often [the case that] everyone we met preferred and accepted becoming reconciled [with violence] rather than defending their rights and looking for legal protection' (BGO 'Gemini, 2004, my translation). Very little anti-gay violence gets publicity or reaches court. BGO 'Gemini' started a project 'Deafening Silence: the Case in My School' in August 2007 that will look at discrimination in 15 schools towards 'different' children – gay, Roma, and

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<sup>10</sup> For more information on 'false homosexuality': 'Sega' 19/01/2007 *Last Calls for the Army in March*; 'Show' 22.09.2006, pp14-15, Dr. Ilia Vrabchev: *I Released Dim Dukow from Military Service*.

disabled in attempt to give more publicity to these issues and to popularise good anti-discrimination practices. This campaign is not targeted at violence but hopefully some violence-related issues will be raised.

## **1.8. *Immigration and Intimate Relationships***

### **1.8.1. Is there a right to “family reunion”?**

There are new regulations concerning entering, staying and leaving the country that came into power since Bulgaria joined the EU in January 2007. The Law on Entrance, Residence and Leaving the Republic of Bulgaria of European Union Citizens and Members of Their Families gives a definition of family member as ‘a person who has contracted marriage or is in a de facto union with a EU citizen, a relative of descending line of the EU citizen who is not a Bulgarian citizen and has not turned 21 years or is a dependent person, or a successor of the spouse; a relative of ascending line who is dependent on the EU citizen or the spouse’ (Additional Provisions, Art 1). According to this law the ‘family members’ of a EU citizen mentioned above are allowed to enter and reside in the country even if they are not EU citizens. In addition to ‘family members’ (as defined by this law), other non-EU citizens who can enter and reside in Bulgaria are: ‘other non-EU family members’ who, in the country where s/he is coming from, are dependent on the EU citizen, or belong to the same household, or in cases where serious health problems require personal care for the family member of the EU citizen.

A different law is in power for ‘foreigners’, defined as non-EU citizens and non-EU spouses of Bulgarian citizens. The right to ‘family reunion’ is regulated by the Law for Foreigners in the Republic of Bulgaria (SG 153/23.12.1998, last amendment SG 63/3.08.2007). This law gives a narrower definition of a family, which excludes couples in de facto unions in some of cases. According to the provisions family members of Bulgarian citizens can enter and stay in the country, these are: a spouse, unmarried relatives of descending line under the age of 21; relatives of descending line over 21 when they do not have their own income and are dependent on the Bulgarian citizen because they are not able to provide for themselves, or because of health problems; a relative of ascending line who is dependent on the Bulgarian citizen; other people who were members of the household of the Bulgarian citizen in the country of their origin or

residence who have health problems and are under the care of the Bulgarian citizen. A non-EU citizen can receive a residence permit if they are the family member of a person with residence permit, or a de facto union partner, or a parent. The law defines a 'de facto non-marital cohabitation' as circumstances when the people live in the same household on a matrimonial [spouse-based] basis.

Law for Amendment and Supplement of the Law on Asylum and Refugees (SG 54/2002, last amendment 14.06.2007) gives the same rights to refugees and asylum seekers and their sources and underage non-married children (Art.8; 9 and 22). In this law 'family members' are explicitly defined as the spouse and under-age unmarried children, or parents of the spouses when they are dependent on their children due to age or illness (Additional Decree, 54:1: 3). In this sense unmarried couples do not have the right to family reunion on the basis that one of them is given asylum seeker or refugee status. The regulations are the same in case where one of the spouses has Indefinite Leave to Remain. The other spouse can claim the same status, but not an unmarried partner (Regulations for the Implementation of the Law for Foreigners in the Republic of Bulgaria, 2000, last amendment SG 49/19.06.2007, Art.27)

### **1.8.2. What is the law/ policy about immigration for the purposes of marriage?**

A new article of the Law for Foreigners in the Republic of Bulgaria that came into power in 2001 regulates immigration in relation to marriage. According to this the application for permanent residence can be rejected, or a given residence permit can be revoked if there is evidence that the marriage was contracted only for the purposes of avoiding the regulations concerning the entrance and residence of foreign citizens in the country. Such evidence includes: the spouses not living together; a lack of contribution to the obligations linked to marriage; the spouses not knowing each other before the marriage; providing contradictory information about the personal data on the other spouse (name,

address, nationality, profession), or about the circumstances of the acquaintance; if the spouses do not speak a common language; payment of money on entering marriage besides the traditional marriage dowery. Immigration for the purposes of marriage cannot be grounds for an application for a visa for Bulgaria. Visas are issued for private visits, business trips, cultural exchange, sport events, health treatments, and tourism (Ministry of Foreign Affairs, 2007).

### **1.8.3. Do unmarried and same-sex couples have the right for the non-national partner to immigrate?**

According to the regulations there is no distinction between heterosexual and same-sex couples. Unmarried partners have the right to immigrate if their partner is a EU-national or non-EU national who holds a residence permit. Marriage is also necessary for joining a partner with a refugee/ asylum seeker status.

## **1.9. *Single People and Solo Living***

### **1.9.1. Is there any public/ policy debate about the rise in solo living?**

#### **Comment**

It is very difficult to translate the phrases ‘single people’ and ‘solo living’ into Bulgarian, without losing the original meaning. ‘Single’ as a civil status category is referred to as ‘not married’ [неженен/а], and in the cases when it relates to relationship status the word that is used is ‘сам’, ‘самотен’ that corresponds to ‘lonely’ in English. In this second sense, ‘lonely [single] people’ is very often used to describe old people or single parents, not the young single people who are ‘not married’ but not ‘lonely’. There is another word that could be used for the translation of single – ‘необвързан’ but its direct translation into English is ‘uncommitted’ or ‘unattached’.

Following from the meaning of the terms described above, there are two types of debates– the rise in the number of people who do not get married and the rise in the proportion of old people who are single. There are policy initiatives targeting both groups. Single young people are encouraged to have children mostly through benefits, such as those described in the section on Parenting and Reproduction. Single parenting is another topic of public attention here. The policy initiatives targeted at old single people include: the National Program for Personal Assistant where people in need of care can have a personal assistant; Social Refectories providing warm meals for the so-called ‘groups in unequal position’, like old people, single mothers, the disabled, and the homeless. Another initiative is the registering of old people who are single or in poor health done by the National Fire Brigade aimed at increasing the efficiency of the service in events of fire (Standart, 23.10.2003).

Solo living in the sense of people who decide to live alone is rarely discussed. In spite of this data from the Census shows that there is rise in solo living (one-person households) but a decline in the proportion of non-married people.



Information about single-person households is not divided into gender, age, occupation and therefore it is difficult to say to what extent these changes are due to the increase of the elderly as proportion of the population and/ or younger people living alone.

**1.9.2. Is there any social/ public housing provision for single people?  
Are there any social security benefits for single/ solo living people?**

Housing provision does not depend on relationship status but on the housing conditions under which a person lives. Single people can have priority for state housing if they have lived 'under hard living conditions for longer' than other people in similar situation. However, according to the Regulations on the Implementation of the Law on Municipal Property families with two or more children or parents with underage children have priority for state housing.

There are numerous social security benefits that are available to single/ solo living people, and some of them are targeted at such individuals (for example, the elderly, disabled, orphans or single parents) but there are no benefits that are specifically aimed at single people or solo living as such. Those entitled to social benefits are: individuals, families, or cohabiting Bulgarian citizens who are not able to take care of themselves alone or with the help of people obliged by law to care for them for the following reasons: health, age, social reasons, other reasons that do not depend on the individual (Regulations for the Implementation of the Social Security Law).

There are monthly social benefits for very poor people and one of the requirements is that the residence of the solo living person is not bigger than 1 room (kitchens are not counted as rooms, but living rooms are), or that the person did not travel abroad at their own expenses during the last 12 months unless for health treatment or bereavement (Sofia Social Security Office, no date).

There are sole-purpose benefits for heating/ electricity and for paying rent available to people with lower incomes. The benefit for paying rent is available only for people living in state housing, who are solo living ('lonely') and older than 70 years; orphans not older than 25 years; single ('lonely') parents; solo living ('lonely') people with 1<sup>st</sup> or 2<sup>nd</sup> group disability (Sofia Social Security Office).

## **1.10. (Trans)gender Recognition**

### **1.10.1. What is the legal situation regarding trans people? Is there provision to register a person's "new gender", for instance, by changing birth certificates and passports? What is required (i.e. surgery?) to achieve recognition of "new gender"?**

The circumstance of trans people are not legally defined in Bulgaria, which also means that it has never been illegal. The first sex-reassignment surgery was done in 1993 to a 28-year old male-to-female trans person (Show, 01.06.2006). There were no legal obstacles to the operation and the court procedures for change of name, Personal Number and Birth Certificate followed the surgery. This is one of the possible ways; the second one is to go through a court procedure first, and then to have an operation.

The legal regulation of registering someone's 'new gender' is based on the provisions of the Civil Registration Code (SG 67/27.07.1999, last amendment SG 96/29.10.2004), which are not purposefully implemented to regulate transgender cases, but are broad enough to include these cases. According to the Code the conditions for changing one's name are: 'if the name is mocking, disgraceful or socially unacceptable, or in the cases when important circumstances require this' (Art.19). The important circumstances are not legally defined but the practice shows that transgender status is considered an important circumstance by the court. There are no legal obstacles to changing one's name as recognition of the 'new' gender, but the fact that the procedure is not explicitly mentioned makes the process unclear. At the same time the Law for Bulgarian Identification Documents (SG 93/11.08.1998, last amendment SG 29/06.04.2007) explicitly mentions the case of a person changing his/her sex: the person has to apply for new ID within 30 days (Art. 9). The procedure for changing a name includes a court case on the basis of a written request from the interested person.

### **1.10.2. What body/ institution has the authority to deal with transgender issues?**

The main institutions dealing with transgender issues are the Regional Court and the Civil Status Office of the municipality. The prosecutor's office is informed of the case as well. A report of the LGBT Health Project (2006) presents a case study demonstrating all the stages of the procedure. According to that case, the plaintiff filed a statement of claim to the Regional court to be allowed to change his name and personal data. The petition was for recognition that in spite of being psychologically healthy, he had a disturbed sexual identity and gender identity belonging to the other sex and that the person would like the court to allow the necessary changes in his civil registration, sex and name.

This is a civil procedure and all types of evidence allowed by the civil procedure code can be presented. As evidence the plaintiff provided medical records with the diagnosis 'transsexual status', witness testimonies, and written evidence such as birth certificate, and a certificate showing no previous conviction. The court appoints sexual and psychological experts. The first one is to certify if the plaintiff has a discrepancy between his gender identity and his sex, and the second – the determination, free will, understanding of the sex-reassignment procedure, and if there are any symptoms of psychological disorder. The conclusions from the experts were that there are no psychological disorders but there is isolated disturbance of the sexual identity only and that the person is able of understanding the meaning of the procedure and is responsible for his/her own actions. Based on these conclusions the court found the sex-reassignment surgery necessary and as a consequence of this allowed the change of the civil status and names of the plaintiff.

The procedure is complicated and because there is no regulation there have been different court decisions. For example, a female-to-male transgender person (who had not undergone surgery) wanted the Sofia Regional Court to allow her to change her name and birth certificate, but did not get permission. There were no court proceedings because the court found the case unacceptable with the argument that prior to the surgery she would

still have the body of a woman and documents of a man and would be able to marry another woman who would be misled about her sex due to the male ID documents. According to the court the woman had to undergo surgery before making a claim statement for change of name and documents ('Sega', 27.09.2006).

Although there are no legal requirements, it seems that surgery can contribute to the positive outcome of the court case, and that the process is much more difficult if the person had not gone through sex-reassignment. Changes of name and ID number have become more difficult recently and there is more stigma attached to it, according to Daniela Mihajlova (2006), Legal Director of the Roma NGO 'Romani Bach'. She argues that the Ministry of Interior has publicly announced its position against the court decisions allowing such changes because they help conceal a criminal past from the Bulgarian and international authorities that cannot keep their records in order. Mihajlova argues further that the Ministry receives wide public support for this and as a result the Bulgarian judicial institution began to reject more of the claim statements.

There was a wide public debate on the issue in 2005 after Bojko Borissov, then General Secretary of Ministry of Interior and now Mayor of Sofia for second mandate, announced that there were 46 cases of people with a criminal past who have changed their names and ID numbers which makes their monitoring more difficult (Mediapol, 2005).

**Comment**

It is important to point out that the circumstances that create association of trans people with criminals in public opinion. The cases when names are changed due to sex reassignment are rarely mentioned, and even if they are it is not clearly explained that the motives of trans people are different and far from criminal. Therefore the gaps in the functioning of the law effect the rights of trans people who have no other option but to go through the court procedure. This demonstrates the necessity for creating legislation and practice specific to the needs of trans people. This will make the procedure clearer, more transparent and accessible for people who want their 'new' gender to be recognised. There will be clear recognition that the motives of trans people are not criminal, and the outcomes of the court (or other) procedures will be more certain.

**1.10.3. Is there anti-discrimination legislation regarding trans people?**

The anti-discrimination legislation refers only to 'sex' and 'sexual orientation', there is no reference to 'gender', 'gender identity', 'trans-sexuality', 'inter-sexuality' or other terms that might be used to refer to the rights of trans or intersex people. The protection of their rights, therefore, can be seen only in the general provisions, or those referring to sex and sexuality, which may or may not be relevant/ useful.

**1.10.4. Does the health service provide gender reassignment surgery? Is it free? How is it accessed?**

The National Health Insurance Fund <sup>11</sup> does not pay for gender reassignment surgeries. The Regulation N40/24.11.2004 for Defining the Main Package of Health Services Covered by the Budget of the National Health Insurance Fund provides a list of all

<sup>11</sup> The National Health Insurance Fund [Национална Здравноосигурителна Каса] was founded in 1999 as an independent public institution separated from the structure of the social healthcare system and has its own bodies of management. NHIF carries out the obligatory health insurance in the country. (<http://www.nhif.bg/eng/default.phtml>) [accessed 19.02.2008]

procedures covered by the health insurance of the patients and none of the plastic reconstruction and aesthetic surgeries are included.

There is no fixed procedure of gender reassignment and no institution or helpdesk to provide information about how this service can be accessed. It depends on the individual to find a clinic carrying out such operations, relying on personal contacts, or by looking at websites of clinics, discussion forums, web pages of LGBT organisations. After doing the same I found that the possibilities are not many – there is only one state hospital and several private clinics offering gender reassignment surgery. There are quite a few plastic reconstruction and aesthetic surgery clinics that do not mention gender reassignment surgery on their websites but there is possibility that the procedure is available.

**1.10.5. Is there a law regulating the act of naming? To what extent are names gendered? Are there restrictions to the names accessible to transgender people based on gender specificities?**

The Civil Registration Act (SG 67/ 27.07.1999, last amendment 2006) regulates naming. According to this the first name of every person is chosen and announced in writing by the parents before the civil servant when the Birth Certificate is issued. If there is no agreement between the parents the civil servant chooses the most appropriate one. According to the same law, Article 4, in the cases when the name is ‘mocking, disgraceful, socially unacceptable or inconsistent with the national dignity of the Bulgarian nation’ the official has the right to refuse to write the name on the Birth Certificate and may choose a name that is appropriate. Almost all first names are gendered, there are very few that can be used by both men and women. Although there are no legal requirements or restrictions on first names, besides those mentioned in Art.4, it is quite likely that the civil servant will refuse (and has the legal right to do so) to accept a female name to be given to a boy and the other way around, for example with the argument that this is socially unacceptable.

The second name formed from the name of the father with ending of –ov or –ev for boys and –ova or –eva for girls, unless the name of the father does not allow the use of the suffixes or if the family, ethnic or religious tradition of the person require something else (Article 13). The family name is formed according to the same principles, with one more option, to be formed from the name of the father's father first name. If only the mother of the child is known the second and last name of the child is formed after the name of the mother, or her father (last name).

### **Changing name**

Bulgarian names consist of 3 parts (Civil Registration Act, SG 67/ 27.07.1999, last amendment 2006):

- 'Own name': chosen by the parents of the baby; it usually consists of one name (for example, Anna, or Joan) but can sometimes consist of two or more (Anna-Maria or Joan-Asen)
- 'Father's name': formed from the first name of the father with suffix corresponding to the gender of the child. If the parents want the 'father's name' can be formed after the 'own name' of the grandfather (father's side). In the cases when the father is not known the 'father's name' is formed from the 'own name' of the mother in the same way. If the parents are not married, the father has to register himself as the biological father of the baby. This process is called 'recognition' [припознаване] and only after it can the child be given the names of his/her father ('father's name' and 'family name').
- 'Family name': this is usually the family name of the father. If the parents want the 'family name' can be formed after the 'own name' of the grandfather (father's side). In the cases when the father is unknown, or has not 'recognised' the child if he is not married to the mother, the 'family name' is the mother's last name.

There are several occasions when names can be changed: marriage/divorce; adoption; when a person is widely known with a pseudonym; when the name is mocking or



disgraceful; in cases when important circumstances require changes in the names, for example trans people.

Upon marriage every spouse can choose to keep her/his family name, to start using the family name of the other spouse, or to add it. The spouses need to declare what name they will choose when they register for marriage. Heterosexual and same-sex couples, however, do not have the opportunity to change their name and to use the family name of their partner.

The 'own name' of an adopted child can be changed by the court upon the request of the adopting parents. The 'family name' and the 'father's name' are changed automatically to match these of the adopting parents and a new birth certificate is issued. In this way the child's second and third names are formed from the 'own' and 'family' names of the adopter. When a person is widely known with a pseudonym she/he can add it to their name with the approval of the court. As it was mentioned earlier in the report, the change of personal, father, or family names of a trans person can be changed if the court decides that there are important circumstances requiring the change. This is the only possible form of legal recognition of 'new' gender.

## **1.11. Care**

### **1.11.1. Is there any policy/ public debate about care, particularly the “care deficit”?**

Care is generally interpreted in Bulgarian legislation and policy as the right and obligation of parent towards their children, and of children towards their parents. Some close blood relatives such as brothers and sisters are also entitled to care from their close ones. Relations that are not bound by marriage or blood therefore do not entail any obligation to care and/ or support.

The Family Code (SG 41/28.05.1985, last amendment SG 59/20.07.2007) has a chapter on the relations between parents and children and according to it ‘parents are obliged to take care of their children and to prepare them for community work [work in favour of the public]’ (Art.68). Step parents (the exact wording is second father and mother) are obliged to cooperate with the parent in the fulfilment of these obligations. The obligations of children towards their parents include respect for the parents and help, which also relates to step (second) parents. Adult children are ‘obliged to take care of their elderly, impaired (‘incapable of work’) or ill parents. There is also a section on the relations between grandchildren and grandparents. The obligations of grandchildren are to respect and help their grandparents, but the code does not say anything about obligations of grandparents. However, there are rights of grandparents, which are: ‘to have personal relations with non-adult grandchildren’. If the personal relations are obstructed, the regional court can define measures for the personal relations to take place upon the request of the grandparents, unless this is against the interest of the children.

Care obligations are regulated by the Penal Code (SG 26/02.04.1968, last amendment SG 7/07.08.2007). For example, the punishment of a person who reneges obligations to a spouse, ascendant or descendant, unable to take care of themselves, thus putting them in a situation of a serious hardship is probation and public reprobation, unless the crime is

more serious (Art.181).

There were even more strict regulations of care responsibilities during socialism. For example, the Penal Code from 1956 provides for punishment – imprisonment for up to 6 months or fine up to 1000 BGN and public reprobation, for a husband who left his family and was living with another person. The same punishment is stipulated for the person with whom the spouse lives. In the case of second offence the penalty is imprisonment for up to 3 years.

The right to support is legitimised by the Family Code. According to this a person who is unfit for work and cannot support her/himself from his property is entitled to support (Art. 79). The support has to be furnished from the following persons in this order: children, spouse or a former spouse (during the divorce); parents; grandchildren and great-grandchildren; brothers and sisters; grand-father and grand-mother, and ancestors of a higher degree.

The idea of ‘care deficit’ is not discussed as such; the emphasis is more on social security/ benefits due to the decline and aging of the population. The concerns of the government arise from the fact that the fertility rate in the country is below the so-called ‘simple reproduction of the nation’ and the aging of the population. ‘The increasing number and proportion of old people (65+) sets serious challenges to the social security system, social benefit system and healthcare’ (National Demographic Strategy 2007-2020, p 16).

#### **1.11.2. What rights, if any, do people have for (paid or unpaid) leave from work to care for children, partners, family members/ elderly parents, friends?**

All employees are entitled to paid annual leave equal to at least 20 days for full-time employment, and also to unpaid leave, which is counted towards employment service of

up to 30 days per year (Labour Code). There are four types of entitlements linked to raising small children. Firstly, there is Leave for Pregnancy, Childbirth and Adoption including: paid maternity leave (315 days, 45 before the due date); and there is paid leave for breastfeeding (2 hours a day until the baby is 8 months old). Secondly, there is paid leave for childcare (all remaining period until the child is 2 years old), which can be used by a parent, a grandparent, other family member, or a friend, foster family member. Thirdly, there is entitlement to unpaid parental leave (until 3 years of age), counted towards the employment service. Fourthly, there is 6 months unpaid leave for taking care of a small child that can be used until the child reaches 8 years of age. The six months can be split and used on different occasions, or to be used as one slot. A single parent who is raising a child alone, and is not married and/or cohabiting with the other parent is entitled to 12 months instead of 6. The entitlement is the same (12 months) if the other parent has passed away or is deprived of parental rights.

Employees are also entitled to leave for looking after a member of the family who is ill or placed under quarantine, as well as to accompany a family member to necessary medical consultations, tests or treatment (10 days per year if the family member is over the age of 18, and 60 days if it is a child aged 18 or under). This permission is given by GPs upon examination of the patient.

There is no leave for looking after a partner or a friend, unless the employee uses unpaid leave. All entitlements are linked to marriage or blood ties, and most of them are for raising children. There are other entitlements that are individual and are not linked to care, for instance two days paid leave for blood donation, or paid leave for taking entrance exams for education, etc.

## **1.12. Tissue and Organ Donation**

### **1.12.1. Are there restrictions on who can donate bodily tissue and organs to whom? (i.e. family members)**

The Law on Transplantation of Organs, Tissue and Cells (SG/83/19.09.03) regulates donation of bodily tissue and organs. This is another interesting example of a piece that brings cohabitants into consideration. According to this law a living transplantation donor can be only a person who is a relative of the recipient by blood, marriage (up to 4<sup>th</sup> degree), or adoption (not earlier than 3 years after the adoption in the cases when the donor is the adopted person). Only hematopoietic cells can be donated by any active person, even if s/he is not close to the recipient.

However, the Ethics Commission of the Council of Ministers can allow donation in the cases of non-marital cohabitation on a family basis, when the cohabitation has been longer than 2 years and when there is indisputable evidence for the cohabitation of the couple. Biological fathers can be allowed to be donors to their children in the cases when they are not married to the mother of the recipient, or if they have not recognised the child. However, only blood relatives (child, parent, brother, or sister) or a spouse can object to the posthumous donation of organs/ tissues from their relative. Here, no exceptions are mentioned in the legislation (Law on Transplantation of Organs, Tissue and Cells, Art. 21). The older regulations of donations from living donors were part of the People's Health Law, which was in effect before the new Health Law was adopted. According to them a living donor could only be a blood relative of direct descendent or indirect descendent up to 4<sup>th</sup> level. Exceptions were only allowed for spouses or people who are related through adoption (Art.35, SG/12/1997) but not for people in de facto unions.

### **1.13. Bulgaria: Observations and Concluding Remarks**

#### **Historic Trends of the Idea of Citizenship in Bulgaria**

Citizenship in the history of New Bulgaria (after 1878) has had different directions of development. After the liberation from Turkey (1878) citizenship was mainly focused around issues of nation-state and unification of the Bulgarian nation which was divided into Principality Bulgaria (independent) and Eastern Rumelia (under Turkish governance). During communism (1944-1989) citizenship took a different path, with still great emphasis on nation but this time in relation to the population homogeneity. All ethnic groups were ‘encouraged’ to identify as Bulgarians. This introduced ethnicity and religion as important issues related to citizenship. Another aspect important during socialism was the place of origin, or local citizenship so to speak. There were inter-country restrictions on mobility and employment of individuals outside their birth town.

Since the fall of communism the membership in the European Union has received an important role, which can be framed as European citizenship. Here issues that became important are cross-national migration and European human rights regulations. Bulgaria did not have another wave of nationalist citizenship in the same way that other post-socialist countries did, such as the former Yugoslav republics and members of the Soviet Union. Intimate citizenship, although it has never been in the focus of citizenship issues, it has had a very dynamic history, for example in relation to abortion rights, marriage and divorce legislation.

Concerns with rights in the sphere of *intimacy* have intensified with time, mostly during the last decade. There are still quite a few policy and law documents where ‘sexual orientation’ is missing, for example the Law on the Ombudsman (2004). It has to be noted that gender as grounds of discrimination is not present in any of the documents, as this word does not exist in the Bulgarian language. There are two words that can be used instead of gender – ‘пол’ (sex) and ‘род’ (kin) but they do not carry exactly the same

meaning. Some sociologists have recently started to make attempts to capture the meaning of 'gender' with the phrase 'социален пол' (social sex), while most NGOs working in the area use the foreign word 'gender' without translation.

In comparison to 'sexual orientation' which is the new-comer in Bulgarian legislation and policy, 'sex' has a longer tradition and was present in the first Bulgarian (Turnovo) Constitution from (1879) when regulating the freeing of slaves. This can be explained in relation to the historical development of the idea of human rights. As Charlesworth and Chinkin (2000) argue, legal theory defines several spheres of rights, called 'generations'. The first generation consists of individual and political rights and freedoms that serve as protection of the individual against the state. These rights include right to life and freedom from torture, right to liberty and security of the person, right to free movement and residence, and freedom of expression, freedom of thought, conscience and religion, the right to marry and to found a family; the right to own property (Universal Declaration of Human Rights adopted by General Assembly, Resolution 217 A (III) of 10 December 1948).

Charlesworth and Chinkin (2000) further argue that the first generation of human rights are based on a clear-cut dichotomy of the public and the private that is additionally obscured by gender inequality in the understanding of what rights should be protected. As a result some issues of particular importance to intimate citizenship, such as sexual harassment and domestic violence have not been initially recognised. It has been only recently that rights related to intimate citizenship have been added to the more traditional understanding of human rights. Charlesworth and Chinkin (2000, p 37) point out that only in 1998 did International Criminal Tribunal began to consider rape and sexual violence against women as genocide in the same terms as acts against national, ethnic, and religious groups.

The second generation of human rights are of social, economic and cultural nature, such as the right to social security; the right to work; the right to equal pay for equal work; the

right to rest and leisure; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life of the community (Universal Declaration of Human Rights). These rights do not 'abide' to the public/private dichotomy in a straight forward way and as a result of this they have had more controversial status and weaker implementation at international law (Charlesworth and Chinkin, 2000, p 237).

The third basket is the most recent one that reflects contemporary global developments and justified rights linked to access to information, healthy environment, living standards, and right to intimate life, and most importantly in relation to intimate citizenship – the right to self-determination. The right to self-determination is usually related to political status and free persuasion of economic, social and cultural development (International Convent on Civil and Political Rights, Adopted UN General Assembly Resolution 2200 A (XXI) of 16 December 1966), hence the meaning of self-determination extends into the private sphere and 'incorporates family relations, cultural and religious traditions and sex and gender roles within society' (Charlesworth and Chinkin, 2000, p154). Self-determination can be understood as the right to define and express one's own sexuality and to choose one's own lifestyle (National Organisation for Women, 2004). The shortcomings of the definition of self-determination lie within the assumption of group identity and commonality (Charlesworth and Chinkin, 2000, p154) and become particularly apparent in relation to gender and sexuality. In spite of the shortcomings of the classification of human rights into three generations, it demonstrates the dynamics of the conceptualisation of human and political rights, where intimate citizenship is the 'new-found' land of rights and freedoms.

This is observable in Bulgarian legislation where the classical rights such as individual and political rights from the first basket and some of the rights from the second, such as education, were enacted by the Bulgarian Tarnovo Constitution dating from 1879. At the same time rights related to intimate citizenship have been incorporated into legislation very recently. For example, the first Antidiscrimination law that explicitly opposes



discrimination on the grounds of sexuality was passed in 2004. Since then sexuality has been included in other policy documents, but not yet in the Constitution. Examples of this were given in the section on Homosexuality and Anti-Discrimination Legislation.

Another observation relates to the legislative and policy obsession with marital and blood ties. It appears that both 'marriage' and 'origin' have relatively equal weight and importance and give rise to quite similar rights and obligations. It can be argued that legislative documents offer a 'classification' of the ties that can be seen as implicit 'rating' of kin relations in order of importance. In this sense marriage and parent-child relations (including adoption-related ones) have a privileged status, followed by other more distant blood relations, then relations acquired through marriage, and then are all other relations. The group of 'other' is very diverse and I would put here same-sex partnerships, de facto unions, and friendship.

This last group, that I would call 'significant others', has few rights and obligations as it is almost non-existent in present Bulgarian legislation and policy. The right and relations with 'significant others' are usually 'written between the lines' of the documents or implemented in practice, which makes them heavily dependent on the personal judgments of civil servants. This creates a lot of possibilities for indirect discrimination and corruption. Whenever there are legal rights and entitlements, these are linked to the economy of the household, rather than to personal relations which result in de-sexualisation of non-marital relations.

However, there is growing awareness that marriage/ blood relationships do not exhaust the closest intimate relations, especially as more than half of children were born outside the wedlock in the recent years. The place of cohabiting partnerships (LATs are not discussed at all) in legislation and policy is becoming more and more contested. It is recognised that the group that I have framed as 'significant others', or at least some of the relationships in this group, needs to be given higher priority in terms of legislation. Debates are mostly related to the rights of the children of non-married couples and the

obligation of their parents. It seems that the changes that are most likely to happen first are linked to some wider recognition of heterosexual cohabitation. It will be very interesting to explore if this 'climate of change' has been created under the impact of any NGOs and of women's NGOs in particular. Recognition of same-sex cohabitation and the option of civil partnership for gay couples or same-sex marriage are discussed by the LGBT non-government sector but not by legislators and is much less likely to happen at this stage.

## **1.14. Bulgaria Appendices**

### **1.14.1. 'Homosexuals' vs. Alma Mater**

This is the first case of sexual discrimination won by one of the biggest LGBT organisations, Queer Bulgaria, on behalf of the victims. The Sofia University 'St. Kliment Ohridski' was found guilty of direct discrimination against a group of four young men who were denied access to the sauna in January 2004 due to their sexual orientation.

The young people were members of a non-formal sports club 'Delfin' whose members attended the sauna of Sofia University regularly. According to the management of the University there were many complaints from other people using the sauna that members of the group were openly demonstrating their intimacy and once two of them were even seen having sex in the shower room. Based on these complaints the Chancellor of the University gave verbal orders that the group not to be allowed to use the sauna. As a result, the four victims were denied access and verbally assaulted by the security guards.

The organisation Queer Bulgaria initiated a court case on behalf of the victims with the following claims: access to the sauna be allowed, the court to enjoin the University from giving such discriminatory restrictions, the victims to receive compensation of 2000 BGN. The regional court found the University guilty of direct discrimination, and the sentence was confirmed by the Sofia Public Court based on the argument that the victims have suffered non-material damages due to the caused feelings of insult and humiliation, of inferiority and violation of their self-esteem, and discomfort from the unfair accusation that they were doing something criminal or uncivilized. The remedy offered to the each of the victims was 500 Bulgarian leva and the University had to grant their access to the sauna.

The case attracted a lot of media attention and triggered homophobic attitudes and statements, including in media publications. The fact that a group of gay men can take the university authorities to court was described as ‘scandalous and unprecedented’ by the newspaper ‘168 Hours’ (21.11.2004 cited in Pisankyneva and Panaiotov, 2005, no page). This was the first judicial trial for discrimination on the basis of sexual orientation and would have not been possible without the new legislation. The main comments were that the lawyers of the University underestimated the case and did not take into consideration the shifted burden of proof provided by the Law on Protection against Discrimination.

### **1.14.2. Biology vs. Marriage**

This case study represents the real-life circumstances of Anna<sup>12</sup> in the way that she explained them in Lex.bg. Lex.bg is an on-line portal offering a range of judicial materials and services. The site also contains discussion forums where individuals publish information on difficult or problematic situations and seek advice from practicing lawyers. This case was published and discussed by Anna and several lawyers in the discussion forum on Family Law.

Anna’s circumstances: Anna was married to Ivan when she gave birth to a child whose biological father was Peter and not her husband. Although Anna and Ivan were going through a divorce procedure officially the marriage was not terminated. According to the regulations of the Family Code Ivan - the husband of the mother - was put down as the father of the baby on the birth certificate. This child was given Ivan’s family name. Later Anna divorced Ivan and married Peter who was the biological father of her baby. She requested a DNA expertise to be done at a private hospital and the results proved that Peter, her second husband, was the father. Later Peter died.

Now Anna’s child is 21 years old and wants to use the family name of his ‘real’ father and to prove his origin. Anna is asking for legal advice on how the biological father of

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<sup>12</sup> All personal names are pseudonyms

the child can be recognised and the names changed. Anna received the following comments on her case from lawyers:

1. The important aspect is that the child was born during the marriage with the first husband and therefore the law does not allow for any other possibility than him to be the father.
2. The DNA expertise is illegitimate before the court because it was not done as part of a case contesting fatherhood.
3. As the biological father has passed away there is no way to prove that the DNA used for the test was his.
4. The law does not allow the child to make a claim and to contest fatherhood in cases when the father is known in the sense that he is defined by the law. If the father is not known the child can request search for paternity origin, but no later than 3 years after entering adulthood.
5. The mother of the child can contest fatherhood only within 1 year from the birth of the child. There is no legal procedure after the end of the first year that would allow the mother to change the father of the baby. In this case the deadline has been missed.
6. In the presence of a legally defined origin from the father (husband of the mother) the biological father cannot admit to being the father of the baby and to recognise his paternity.
7. The change of names can have a separate court case that can be initiated by Anna's child. However, the lawyer believed that it was not very likely that the court would allow the child to change his names with the argument that very important circumstances required this. The lawyer discussed a recent case from her/his practice when the court

allowed a young adult to take the names of a person who he felt very close and like a father in spite that they were not biologically related. This happened because the biological father of the boy was unknown.

8. Even if the court allowed the change of the names, Anna's child would still not be considered legally as son of her second husband in spite that he might be allowed to carry his name and that in fact he is the biological father.

Conclusion: the experts agreed that according to their practice and competence the officially registered father could not be changed. Anna did not say if she still wanted to initiate a court procedure after the comments on her case.

Reference:

Lex.bg, Family Casus, Topic: Origin of a Child [Произход на дете], Posted on: 18.12.2007

### 1.14.3. Public Morality vs. Azis



A billboard with the image of a famous homosexual couple was removed from the streets in several Bulgarian cities in late November 2007. The accusations were that it was pornographic and scandalous and was removed because of the municipalities received many complaints from shocked citizens.

The image on the billboard was part of the PR campaign of a new television and portrayed a famous Bulgarian pop-folk<sup>13</sup> singer Azis exchanging intimate caressing with

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<sup>13</sup> Pop-folk music, and Azis in particular, are very famous in Bulgaria. However, it is considered to be of very 'low-level' 'crass' music.

his same-sex partner (the image on the left). The personality of Azis is a very controversial one, often in the spotlight of the Bulgarian media. The singer, who is from the Roma minoritised ethnic group, became very popular with his voice but also with his non-standard stage behaviour of cross-dressing, nakedness, and pronounced homosexuality. He has often gained the attention of the public with his decisions to enlarge his penis, to get breast implants, to marry his same-sex partner, to become a father and raise the child together with his partner and the mother of the baby. Much liked and much hated Azis has always been a widely discussed public figure. He took part in the Bulgarian version of Celebrity Big Brother with his partner in 2007 (Standart, 12.04.2007), was one of the people nominated by the Bulgarian National Television within the campaign for public election of the greatest Bulgarians in 2007 (Standart, 18.12.2006) and came 21st, and took part in the elections for members of Parliament in as a Honorable Chairperson of the Roma minority party 'Euroroma' (Dnevnik, 03.05.2005).

This is the second time when his billboards are removed. The first time they contained the image of his bare bottom and were promoting a new single in 2004. The debate is very heated based around the issue of whether this is discrimination, if the municipalities had the legal right to remove the billboards, and if they were against public morality more than other naked images, for example of naked women.

The Bulgaria Gay Organisation 'Gemini' sent an open letter to the Bulgarian media where they argued that there are no legal reasons for the removal of this image, and that Bulgarian society 'cannot accept that love can exist between same-sex partners, the idea of homosexual families, or the fact that two gay people have feelings, cannot accept the fact that the happiness of the children of 'normal' [people] can be with a person from the same sex' (quote from 'Capital', 23.11.2007, no page). In support of the argument there is an image of billboard with the advertisement of Vodka 'Flirt' with a provocative blond in underwear holding a whip (see image below).



### 1.17. Glossary on Intimate Citizenship

Бисексуален*	Bisexual (borrowed from English)
Гей, хомосексуален мъж*	Gay/ homosexual men (both borrowed)
Годеник	Fiancé
Граждански съюз	Civil Partnership (literally means ‘civil union’, generally not widely popular phrase)
Домакинство	Household
Извънбрачно дете	Outside-of-marriage child (illegitimate)
Интерсексуален*	Intersexual (borrowed)
ЛГБТ*	LGBT (borrowed)
Лесбийка, хомосексуална жена*	Lesbian, Homosexual woman (very close to English)
Операция за смяна на пола	Gender reassignment surgery (literally: operation for change of sex)
Партньор	Partner (not very popular expression, man/woman used instead)
Полава идентичност	Gender (literally: sex) identity
Пол	Sex
Приятел/ Приятелка	Boyfriend/Girlfriend (literally: friend)
Сексуална ориентация	Sexual orientation (very close to English)
Съвместно съжителство	(Mutual) cohabitation
Съпруг/а	Spouse
Трансвестит*	Transvestite (borrowed from English)
Транссексуалност*	Transsexuality (borrowed)
Хетеросексуалност*	Heterosexuality (very close to English)
Хомосексуалност*	Homosexuality (very close to English)
Хомофобия*	Homophobia (borrowed)
Хамафродит*	Hermaphrodite (borrowed)
Coming Out*	Often even written in English



Cross Dressing*	Often even written in English
Queer (Куйър)*	Often written in English
Words that do not exist in Bulgarian	Gender Straight (we say 'normal')
Offensive words used for gay man, unfortunately quite popular (meaning translated)	Pederast, pedal, reversed, left carving, left lane, soft wrists, homo, gentle men
No corresponding words for women exist, usually called 'lesbian'	

\* All words with '\*' are either identical to those used in English or very close to them.

## **2. Norway**

Tone Hellesund

### **2.1. Marriage**

#### **2.1.1. What is the legal definition of marriage?**

There doesn't exist a legal definition of marriage apart from the definition of who can get married, and who cannot. The Constitution does not mention marriage. Although not explicitly mentioned, until June 2008, it was understood that the Marriage Act was meant for different-sex couples. In the revised Marriage Act of June 2008, it is clearly stated that the law also includes same-sex couples (Innst.O.nr.63 (2007-2008)). The new law will be valid from 1 January 2009.

#### **2.1.2. At what age can people get married?**

The general rule is that people can get married at 18, which is also the general legal age. However, The Marriage Act allows for persons over 16 (age of sexual consent) and under 18 to be married if they gain consent from those holding parental responsibility and permission from the regional commissioner. In the 2006/07-discussion of a new Immigration Act (LOV-1988-06-24-64), some politicians etc have suggested that the legal marriage-age should be 21 or 24 years old for those wishing to marry a person from a country requiring visas to enter Norway. The motive is said to be protection against forced marriages<sup>14</sup>. These suggestions are discussed in NOU<sup>15</sup> 2004:20.

#### **2.1.3. What obstacles are there to marriage? (What can stop people being allowed to marry?)**

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<sup>14</sup> For a fuller discussion of the Norwegian immigration acts and gender implications, see Halsaa, Perdelli and Thun 2008).

<sup>15</sup> NOU's are short form for Norges offentlige utredninger - "Norwegian Official Reports". The government appoint committees and working parties to report on different societal conditions. Such an evaluation/report can be presented either as a NOU or as a Government report. The committees usually consists of experts, users and bureaucrats. The NOU's are large documents, usually taking years to prepare.

The conditions for entering into marriage are focused on:

- Age (general rule: must be over 18)
- Voluntarism (must be voluntary)
- Legal capacity (those without legal capacity must have permission from guardian or county governor)
- Relations (must not be closely related)
- Bigamy (must not be married already)
- Venereal diseases (the intended spouse must be told of disease, and treatment must be sought)
- Residence (must have lawful residence in Norway)

More specifically, from The Marriage Act 2008:

**Section 1. *Age for marriage***

No person under 18 years of age may contract a marriage without the consent of the persons or person having parental responsibility, and the permission of the county governor.

If one of the persons having parental responsibility lacks the capacity to act legally, or if consent cannot be obtained within a reasonable time, the consent of the other person is sufficient. If both persons are in this position, and a guardian has been appointed, the consent of the guardian is required.

The county governor may only give permission when there are special reasons for contracting a marriage.

If the persons or person having parental responsibility or the guardian refuses to consent, the county governor may nevertheless give permission if there is no reasonable ground for such refusal.

**Section 1 a. *Voluntariness***

Women and men have the same right to choose a spouse freely. They shall contract the

marriage of their own free will and by their own consent.

Added by the Act of 10 June 2005 No. 38 (in force from 1 July 2005 pursuant to the Decree of 10 June 2005 No. 527).

**Section 2.** *Right of persons who have been declared to be without legal capacity or for whom a provisional guardian has been appointed to contract a marriage*

Any person who has been declared to be without legal capacity must obtain the consent of his/her guardian to contract a marriage. If consent is refused by the guardian or provisional guardian, the county governor may nevertheless give permission if there is no reasonable ground for such refusal.

**Section 3.** *Prohibition against marriage between close relatives*

Marriage may not be contracted between relatives in direct line of ascent or descent or between brothers and sisters. With regard to adopted children, the above prohibition applies to both the natural relatives and the adoptive parents and their relatives. If the adopted child has been adopted anew, the county governor may however consent to a marriage between the adopted child and one of the original adoptive parents or a relative of the latter.

**Section 4.** *Prohibition against marriage when a previous marriage subsists*

No person may contract a marriage if a previous marriage or registered partnership subsists. Amended by the Act of 30 April 1993 No. 40.

**Section 5.** *Obligation to provide information and seek counselling regarding a contagious disease that may be transmitted sexually* No person suffering from a contagious disease that may be transmitted sexually may contract a marriage unless the other party has been informed of the disease and both parties have received oral counselling from a medical practitioner regarding the risks connected with the disease. The statutory duty of professional secrecy shall not prevent a medical practitioner from giving information about the disease to a solemnizer of marriage or from being called as a witness in a matrimonial case.

### **Section 5a. *Lawful residence***

In order to contract a marriage in Norway, a foreign national must be lawfully resident in Norway. Added by the Act of 24 June 1994 No. 24 (in force from 1 January 1995).

(Act 1991-07-04 NO. 47: The Marriage Act)

### **2.1.4. Civil versus religious marriage? Where and how do people get married?**

The Marriage Act states that the groups with the right to marry people are:

1. Priests and leaders of registered communities of faith, or the master of ceremonies or equivalent in a community of faith receiving public funding
2. Notarius publicus (district recorders or urban district court judges)
3. Officers of the Foreign Office
4. Persons given the right to marry by a special measure, usually when needed because of vast distances or other. The special measure is valid for 4 years

The Norwegian state thus grants the right to perform marriages to religious communities. When the new Marriage Act comes into force from January 2009, the lawful masters of wedding ceremonies from religious communities will have the right to refuse to marry a couple of the same sex (Innst.O.nr.63 (2007-2008)).

### **2.1.5. When is marriage void or voidable**

The marriage can be declared void if it is a result of force (The Marriage Act §23), if the spouses are close relatives, or if one of them – or both – were already married (bigamy) (The Marriage Act §24) (Consummation is not a part of the discussion, and there is no possibility of declaring a marriage void if not sexually consummated).

### **2.1.6. What are the fiscal benefits and privileges of marriage – e.g. tax (is there a married couples' tax allowance?), social security and unemployment benefits, pensions and survivors benefits, carers' allowances, inheritance rights?**

As private tax-payers there are two different tax-categories, 1 & 2. The general rule is that all individuals pay as category 1, and receive individual tax-returns. Tax-category 2 is meant to ease the tax-burden for persons with dependants. If you financially support another person, if you are a single parent or if you have a spouse who earns very little, you can be taxed as category 2. If you potentially qualify for category 2, the tax authorities will automatically place you where you pay the lowest tax. Married/registered partnered couples are thus treated as a unit in regard to taxes (§ 2-10). The intention with this two-category tax system, is to give tax relief for persons supporting others. The tax-relief is not substantial. All adults receive their own individual tax return, and have to answer for it individually (Risanger 2005:161).

The *Law on tax* § 6-48 also allows parents to subtract costs for care of children under 12 years. The maximum amount is decided by Stortinget<sup>16</sup>. If the child has special needs, the 12 year age limit can be overruled. Here it is parenthood, not marriage, that is relevant and the rules apply regardless of the marital status of the parents.

Unemployment benefits are based on former salary, and are not dependent on civil status.

Before 1997/1998, cohabiting couples got higher retirement and disability pensions than married couples, because they were treated as individuals rather than a couple. Since 1997/98, cohabitating couples have been treated as married couples in this regard (Langseth 2001:61).

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<sup>16</sup> The Norwegian parliament

Retirement pension from the state is individual and does not include any survivor benefits for adults. Most employers are however obligated to have pension-agreements for their employees (Law on Mandatory Occupational Pension - OTP), and some also have private pension insurance. Many of these agreements will include survivor benefits. In most cases cohabitants and married couples will be treated equally (like in OTP), in some agreements survivor benefits will only go to widows/widowers (also included same sex partnership).

For people with children (biological or adopted) 2/3 of their inheritance must go to their child(ren). The last 1/3 can be disposed of through a will. It is impossible to disinherit children under the Norwegian law (both martial children and extramarital children). Compulsory heirship is however never more than 1 000 000 kroner (=120 780 Euros) to each of the children. If the deceased was married/partnered, the spouse will inherit 1/4 and the child(ren) 3/4. Marriage does, however, override parent-child relationships through the statement that “The minimum inheritance should however be equivalent to 4 times the basic amount of the National Insurance” (§6) (6 times if there are no lineal descendants). In 2006 the basic amount equalled 62 892 NOK (=7596 Euros). Persons without children can write wills and will their inheritance to whomever they want (The spouse’s right to 4x G (the basic amount of National Insurance) overrides a testament). If they don’t write a will (which is by far the most usual) the inheritance goes to the lineal descendants (first spouse, than parents, siblings etc), if they don’t have children (Law on Inheritance, Langset 2001, Risanger 2005)

After a NOU 1999:25 *On the Rights of cohabitants*, there has been a political/bureaucratic debate on how to regulate cohabitation as an increasingly common way of living. In January 2007 the government sent out a proposal regarding changes in the Inheritance Act for comments (Høringsnotat snr.200405522 EP). Eventually this proposal was approved by the Cabinet in June 2008 and will be treated by the Storting in the fall of 2008. When approved by the Storting, the changes will regulate inheritance between cohabitants, which under the old law was not seen as a relevant relationship. The

proposal suggests that cohabitants should have the right to inheritance if they have, have had or expect children together, or when they have lived together for more than 5 years. It suggest a mandatory inheritance of 4 x G. The proposal also suggests that cohabitants who have, have had or expect children together should have the same rights as spouses to retain possession of an undivided estate. The proposition underlines that the changes only include cohabitation of a certain kind. “The background for this is that rules concerning inheritance rights according to the Ministry [of Justice and the Police] should be limited to cohabitation that bears evidence of being a life-community [livsfellesskap]. Only then is it reasonable to grant them the rights otherwise belonging to spouses” (Ot.prp.nr.73 (2007-2008):1). The proposition also specifies that both heterosexual and homosexual (heterophile and homophile<sup>17</sup>) cohabitation is included in the proposal.

**2.1.7. What are the social benefits and privileges of marriage – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals, etc.?**

There are no social benefits for married/partnered couples in regard to social housing. Having children or not would be the most important criterion.

In regard to “next of kin”, the Lov om pasientrettigheter/Act of Patient Rights, states that “next of kin” is the one that the patient appoints. If the patient is incapable to express her/his wishes, next of kin is the one with the most permanent and current contact with the patient. This decision should be guided by the following “hierarchy of relationships”: spouse, registered partner, persons living in a marriage-like or registered partnership-like cohabitation with the patient, children of age, parents or others with parental rights, siblings of age, grandparents, other relatives close to the patient, guardian or provisional guardian (LOV-1999-07-02-63, §1.3).

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<sup>17</sup> See 2.15 Norwegian Concepts of Intimate Citizenship



**Comment:**

The proposition around changes in the Inheritance Act discusses many relevant topics such as: how to define cohabitation. Is it enough to be registered at the same address in the Folkeregisteret/National Register for two years to be a cohabitant, or should they live in a “marriage-like relationship? And what about people who cannot marry (like siblings), can they still be cohabitants? And should people choosing not to marry be forced into a judicial union? (Høringsnotat snr.200405522 EP and Ot.prp.nr.73 (2007-2008))

**2.1.8. Is rape in marriage a crime?**

Rape in marriage/partnership is not considered to be different from other rapes. §192 in the Criminal Act is the rape-paragraph. It states:

The one who by violence or by causing someone to fear for their life or health forces them to fornication/unlawful sexual contact or to take part in such a forced act, is punished for rape by prison up to 10 years, but a minimum of 1 year prison if the unlawful sexual contact was intercourse. If the offended dies or is brought upon considerable damage on body or health, or the offender has been previously punished by this paragraph or paragraph 195, the offender can be sentenced to prison for life. Venereal disease is always seen as considerable damage on body or health (Criminal Act, §192)

The paragraph on rape in the current law includes not only intercourse by force, but also sexual acts such as masturbation. The law is gender-neutral, both concerning perpetrator and victim, and is also in force if the parties are married to each other. The paragraph expresses that if a person (with certain means) forces the other to sexual relations, this can be treated as rape under the law.

For a long time it was unusual to raise charges for marital rape, but in 1974 the Supreme Court of Justice judged that rape can not be ruled out even if the parts are married or cohabiting (Rettstidende 1974, page 1121). The Assault paragraph in the

Criminal Act explicitly mentions both marriage, cohabitation, and children/parents as relationships where prosecution should take place in cases of assault (LOV 1902-05-22 nr 10, §228)

<b>Rapes in Norway 1994-2005</b>												
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
<b>Reported</b>	342	348	389	396	419	427	512	581	628	706	739	798
<b>Investigated</b>	349	309	338	358	380	388	381	455	495	581	633	704
<b>Sentenced</b>						31	25	41	52	86	49	77
Source: ( <a href="http://www.ssb.no/emner/03/05/a_krim_tab/tab/tab-2007-02-21-04.html">http://www.ssb.no/emner/03/05/a_krim_tab/tab/tab-2007-02-21-04.html</a> )												

As we can see from this table, less than 10% of the reported rapes lead to sentence. In addition to this come of course the never reported rapes, which are expected to be the vast majority of rapes. The Higher Prosecuting Authority has been critical of this and ordered a report called “An investigation of the Quality of the Prosecution in Rape Cases Where the Accused is Acquitted” (Riksadvokatens utredningsgrupper 2007). On the background of this report the Director General Tor-Aksel Busch (the Head of the Norwegian Prosecuting Authority), the summer 2008, demanded that a jury is removed in rape-cases (Dagbladet 18.08.2008).

Rapes are only one of many sex-crimes. The total number of sex-crimes reported has increased from 2118 in 1993 to 3463 in 2006.

### **2.1.9. What is the law (if any) regarding domestic violence, and what policy initiatives are there to combat it?**

There are several laws and paragraphs concerning domestic violence, particularly the Criminal Act §219, and the government had a particular plan for action against domestic violence 2004-2007.

The law states that:

- §219. Anyone threatening, forcing, restricting the freedom of movement, using violence or in other ways violate or abuse:
- a) present or former spouse
  - b) present or former spouses relative (in direct line)

- c) own relative (in direct line)
  - d) someone in the household
  - e) someone under ones care
- are punished with prison up to three years. For particularly grievous abuse, the punishment is prison up to six years. Complicity is punished in the same way.

The following is copied from the homepage of the shelter movement:

<http://www.krisesenter.com/english/english.html> (accessed 23.09.2008)

“Violence against women as a societal problem was brought on to the socio-political agenda in Norway in the late 1970s. A group of Norwegian women attended a Tribunal on violence against women in Brussels, in 1976. Women from various parts of the world gave witness to the systematic violence they had experienced over several years at the hands of their husbands. On their return to Norway, the Norwegian women established, with the help of private funding, the first telephone line for battered women, in Oslo in 1977. During the course of that year, all the calls to the crisis telephone line were registered. Wife abuse in Norway was thus documented and taken up as an issue for public debate and placed on the political agenda.

The issue was taken up for debate in Parliament. Women from all the political parties saw the need for establishing shelters for battered women, and unanimously supported the call to ear-mark public funding for the running of these shelters. The first shelter with public funding was thus established in Oslo in 1978.

Soon local women’s groups in different parts of the country started opening shelters. These women’s groups constituted the unique and historic shelter movement of Norway. Since 1980, the Movement grew with more shelters being started up. Today (2007) there are 50 shelters and 5 crisis telephones in Norway”.

#### **2.1.10. To what extent are the two parties to a marriage treated as a couple/ unit, and to what extent are they treated as individuals?**

The two parties are sometimes treated as individuals and some times as a couple. There are some occasions that marriage/ couplehood do matter in the meeting with the authorities, like a very modest tax reduction for spouses supporting the other, possible reduction in individual pensions for spouses, special inheritance rules for

spouses/cohabitants. There are individual tax-returns, and in principle individual ownership in marriage. Occasionally the two parties are also treated as a unit when offspring are concerned. One example of this is the mandatory mediation if parents split up.

#### **Comment**

Criminologist Kristin Skjærten argues that the criteria used in the media to highlight violence against women are that it has to be unusual or sensational. The sensational aspect can either be the extremity of the violence, or other unusual elements. In the cases where the perpetrator is ethnic Norwegian/white, the incidents of violence/murder are usually portrayed as individual family problems without any reference to structural problems (Skjærten 2005).

### **2.1.11. Is there legislation/ public debate about forced marriages?**

This field is heavily debated and researched in contemporary Norway, and is a hot political topic. Several new proposals have been launched to prevent forced marriages. These are discussed thoroughly in NOU 2004:20 New Immigration Act<sup>18</sup>. The Marriage Act was revised in 1994 in order to specify that a foreigner (non-citizen) must have legal residence in Norway before they can marry. This revision also states that marriages entered into by force can be declared invalid (Barne- og familiedepartementet 2008). The government has also prepared a major plan of action in relation to forced marriages (Handlingsplan 2008-2011). According to the plan, a new Immigration Act will be in force from January 2010. In the official law instructions for the existing law, there are already guidelines that are supposed to regulate forced marriages.

Some of the issues discussed in the preparatory work for the new Immigration Act are:

- higher age limits on marriage for foreign spouses
- strong emphasis on the ability to support a spouse

<sup>18</sup> For a fuller discussion of gendered implication of a new foreigner Act, see Halsaa, Predelli and Thun 2008.

- measures to prevent pro forma marriages
- prohibition of marriage between first cousins
- specification that one can not get married if both spouses are not present at the wedding

Sociologist Anja Bredal has done the most extensive research on forced marriages in Norway, and she emphasizes the difference between forced marriages and arranged marriages in the public debate. At the same time she argues that there are large numbers of unreported cases of forced marriages in Norway (Bredal & Orupabo 2008, Bredal 2006).

The discussion around forced marriages is both a discussion about how to prevent a problem, and a discussion about normatively approved marriages. In the following press release published May 31, 2007 from the Ministry of Children and Equality one can also read some of the Norwegian norms the authorities want to communicate to foreigners:

**“New rules from 1 June 2007**

A marriage entered into outside Norway will NOT be valid in Norway if:

- One of the parties to the marriage is under the age of 18 when the marriage takes place
- The marriage is entered into without both parties being physically present during the marriage ceremony (marriage by proxy or telephone marriage)
- One of the parties is already married.

In all three cases, at least one of the parties must be a Norwegian national or permanent resident of Norway when the marriage is entered into.

As a rule, a marriage that is entered into outside Norway will otherwise be recognised in Norway if the marriage has been contracted in a valid manner in the country in which it took place.

**Important!**

In order for a marriage to be recognised in Norway, both parties must be at least 18 years old when the marriage is entered into.

**Certificate of marriage and recognition**

Persons who marry outside Norway must personally notify the Norwegian National Population Registry and present a certificate of marriage or other

proof that he or she has entered into marriage. If the Registry finds the marriage to be valid, the marriage will be registered. If, on the other hand, the Registry finds that the marriage is not valid under Norwegian law, for instance because one of the parties was under the age of 18 at the time of marriage, the marriage will not be registered in the National Population Registry.

### **Consequences:**

If a person applies for family reunification, the immigration authorities decide whether his or her marriage is valid in Norway. If the immigration authorities conclude that the marriage is not valid, for instance because one of the parties was under the age of 18 when the marriage was entered into, the application for family reunification in Norway will not be granted. As a result, the couple will not be able to live together in Norway. It is important to be aware that it is the person's age at the time the marriage is entered into that is the decisive factor, which means that it makes no difference to apply for family reunification after both parties have reached the age of 18. The Norwegian Directorate of Children, Youth and Family Affairs may later recognise the marriage if very special circumstances apply.

### **An example:**

Nadia is a Norwegian national and a resident of Norway. She is 16 years old and it is desired that she marry Marco, who is a resident of Country X. They wish to be married in Country X where the legal age of marriage for girls is 16. If they marry in Country X, they will not be regarded as married in Norway – even after Nadia reaches the age of 18. The fact that they are considered to be married in Country X, but not in Norway, will pose practical problems for the couple. Marco will not be eligible for family reunification on the basis of his marriage to Nadia. They decide to wait to get married until Nadia is at least 18 years old.

### **Forced marriage**

Marriage must be entered into freely and willingly. No one must be forced to marry against his or her will. This principle is a human right and is laid down in Norwegian law. It is a criminal offence to force a person to enter into marriage. This applies to both psychological and physical force. The penalty for this offence is imprisonment for up to six years. Any person who aids and abets a forced marriage is also liable to a penalty under the law. This also applies when a person (a Norwegian or foreign national) has committed the offence outside Norway. If, for instance, a father living in Norway forces his daughter to enter into marriage while on a holiday trip to their country of origin, this will also be a criminal offence.”

This press release is published in Norwegian, English, Somali, Sorani, Arabic and Urdu.

**Comment**

Forced marriages and arranged marriages are sometimes mixed up in the public debate. I would claim that arranged marriages are generally seen as morally bad/inferior to marriages based on the ideals of romantic love by the majority population. Interestingly enough, the popular and stately supported marriage classes, are based on an ideology downplaying romantic love, and instead focusing heavily on love and relationships as work and will (Danielsen and Mühleisen 2009).

Denmark is the most restrictive country in Scandinavia in regard to immigrants and immigration policy. Denmark is used as a good example for Norwegian politicians wanting stricter policies, and as a scary example for those with an opposite agenda.

**2.1.12. Is there legislation/debate about incest?**

The Criminal Law has three paragraphs that deal with incest §197, §198 and §199. The law states that sexual relations between close family-members in directly vertical or horizontal lines, or between an adult in the role of a parent and a child are prohibited. The Criminal Act, §196, also states that everyone has a duty to prevent criminal acts by reporting them to the authorities. Incest is mentioned as one such criminal act.

**2.1.13. What is the status of pre-nuptial agreements? Is there an issue about “assets regime” to be decided prior to marriage?**

Pre-nuptial agreements are what in Norway is called “Private Ownership” (Særeie) in marriage. The general rule is “Shared Ownership” in marriage (see 2.4) but “Private Ownership” is a voluntary written agreement. Generally, there is no “assets regime” to be decided prior to marriage. Every spouse continues to own what she or he brought into the marriage. A spouse also owns individually what s/he buys during marriage, what s/he saves during marriage, what s/he receives as gifts or inheritance during marriage. The

couple collectively owns what they have acquired together (Risanger 2005:57-63). There are many rules regulating this, although it can of course be problematic to prove these things during a divorce. There is a special “housewife” clause, stating that contributing with housework and care while the other works can give this person a shared part in the other’s money (Risanger 2005:63).

**Comment**

Sexual relations between first-cousins are not prohibited in Norway, but they are usually seen as incestuous by the majority-population. There have been proposals to make them prohibited. The wish to prohibit first-cousin-marriages is mainly a way to regulate the intimate practices of “foreigners”. First-cousin marriages are particularly known among Pakistani immigrants in Norway, and there have been articulated a wish to stop this, both to avoid “forced marriages” and to avoid hereditary/degenerative diseases (NOU 2004:20: Handlingsplan for integrering og inkludering av innvandrerbefolkningen – styrket innsats 2008).



## **2.2. Divorce**

### **2.2.1. What is the law on divorce – grounds for divorce etc?**

If a partner wants to apply for separation or divorce, s/he must complete a form and send it to the county governor ("Fylkesmannen"). There is no question of “grounds for divorce”. Separation means that the married couple has to live apart for a year before they can get a divorce. If one of the partners of a marriage/registered partnership does not want to sign the papers of separation/divorce, the other needs to live separately from her/him. After two years of living apart, the authorities will grant a divorce (on request) even if one of the partners opposes this. If the spouses have children under the age of 16, they must go to public arbitration to find the best solution for the child(ren) (Marriage Act).

In recent years a question of *halting divorces* has been raised. There has been concern about some Muslim women who have a legal divorce in Norway but who are still not seen as divorced by their religious community (Carli 2008, Thorbjørnsrud 2003, Ot.prp.nr. 100 (2005-2006)). This is the background for the inclusion of a clause about the right to divorce in the Marriage Act which states that “Each of the marrying parts must solemnly swear that they marry of their own free will and recognize each others right to equal divorce” (Marriage Act §7, 1)

There is reason to believe that this new clause poses a more general problem for the Catholic Church than the Islamic community, and the Catholic Church strongly opposed the new clause (Consultative statement from the Catholic Bishop of Oslo, 19.12.2003). They did however not gain acceptance for their opposition (Ot.prp.nr. 100 (2005-2006); The Marriage Act §7, 1).

### 2.2.2. What is the history of divorce legislation? When did it become first available?

In the Norse era, divorces were possible. When Christian laws were established in Norway around 1100, divorce became prohibited (Øye 1999:53-57). After the Lutheran reformation in Norway in 1536 divorces again became a possibility, although only if severe problems like “adultery, impotence or absence for more than 7 years” was the case (Sandvik 1999:117). Historian Hanne Johansen argues that the priests stressed mutuality in the marriage, and that they sometimes granted divorce on the bases of the “tyranny of the husband” (Johansen 1998). Until 1850 divorces were still rare although the practice of granting divorces became increasingly more lenient (Hagemann 1999:195). In 1890 the practice became even more accepting of divorces, and as a result the divorce-numbers increased substantially (Johansen 1998). Until 1909 one could only be divorced by judg(e)ment. In 1909 a new law on divorce made it legal to apply for divorce. From this date the numbers of divorces increased rapidly.

<b>Year/ Period</b>	<b>1901- 1904</b>	<b>1915- 1919</b>	<b>1981- 1985</b>	<b>1986- 1990</b>	<b>1990- 1995</b>	<b>1996- 2000</b>	<b>2001- 2005</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Divorces per year</b>	615	2710	7 451	8 812	10 411	9 608	10 720	11 045	11 040	10 598

During the 1920s and until the early 1950s the numbers steadily increased. During the 1950s it stabilised. From the 1970s the numbers again rose dramatically (Sogner 2003:49)

Compared to the other Nordic countries Norway has the lowest divorce rate of 4,9 divorced per 1000 married persons. While there are 7 divorces per 1 000 married persons in Finland, the numbers are 6,6 for Sweden, 6,3 for Denmark and 5,2 (figures from 1999) (Byberg 2002).

### 2.2.3. Do the major religious groups actively oppose divorce?

All major religious groups oppose divorce, but most recognize that they exist and most allow their members to remarry. The Catholic Church does not accept divorce, nor allow their members to remarry if their former partner still lives. One can apply for annulment of the marriage in the Catholic Church. The Marriage Act, § 13, states that *vigselspersonen* = the master of ceremonies (a person with a right to perform marriage) (see 1.4) can refuse to marry a couple if one of them is divorced and the former partner still lives (The Marriage Act §13).

### 2.2.4. What happens to property and pensions on divorce?

- **Property**

Most Norwegian married couples have what is called Shared Ownership (*felleseie*). This is what automatically happens when people marry, and if you want another arrangement you will have to take measures against that by writing up a legal agreement that overrides the general rule. In “Shared Ownership” (see also 1.13) every spouse continues to own what she or he brought into the marriage. A spouse also owns individually what s/he buys during marriage, what s/he saves during marriage and what s/he receives as gifts or inheritance during marriage. The couple collectively owns what they have acquired together (Risanger 2005:57-63). There are many rules regulating this, although it can of course be problematic to prove these things during a divorce. There is a special “housewife” clause, stating that contributing with housework and care while the other works can give this person a share in the other’s money (Risanger 2005:63).

The other economic option for married couples is “Private Ownership” (*særeie*). This might be called a pre-nuptial agreement. The Marriage Act §43 grants this right. Private ownership is a written agreement on what each one owns, and what should not be seen as shared property in death or divorce (Risanger 2005:84-85). In principle this is also what is the rule in “Shared Ownership (in the case of divorce, not in case of death), but it is of course much easier to prove/agree if you have “Private Ownership”.

- **Widow(ers) pension**

A widow(ers) pension is still given to the divorced partner if the ex-partner dies within 5 years of the divorce. In such cases, the marriage must have lasted for 25 years (without children) or 15 years (with children). The partner loses the right to a pension if he/she remarries.

- **Alimony**

In certain cases, one of the partners after a divorce can demand alimony. The base for this must be that the marriage has undermined the partner's ability to support her/himself. Normally this support would be given for up to three years, but in special cases it could last longer. Alimony is rare in the Norwegian context.

**Comment**

Some economists focusing on women and economics are among the critics of the Norwegian divorce legislation (Ødegaard 2006), claiming that as long as women owns less, earns less, and are absent from paid work to take care of "home and children", women are worse off economically after divorces. Sociologist Anne Hege Strand, doing her PhD on family and gender perspectives on poverty in European Welfare states, argues that this is not correct in the Norwegian case. Because of child benefits and governmental transfers to single parents, women are not worse off. The Norwegian welfare state seems to neutralize gender differences after divorce (Strand, forthcoming).

### **2.2.5. How are decisions about children made after divorce, and what principles apply concerning residence/ custody etc?**

Parents with children under 16 years old have to go to counselling concerning the best interest of the child if they want to divorce. This applies to married couples and from 2007 also for cohabiting couples (Marriage Act § 26). The counselling has to last for at least one hour.

Decision-making in regard to children after divorce is regulated by the Law on Children and Parents of 1981. This states that the parents are free to decide whether the child should stay permanently with one parent and have visiting rights with the other, or if the child shall live equally with both parents. If the parents cannot agree, the court will decide where the child should live permanently. The child has the right to spend time with both of its parents, and the parent not living with the child has the right to see the child. The “usual” visiting right for the parent not living with the child is one afternoon/night a week, every other weekend, 14 days during the summer, and either Christmas or Easter. It has become more and more common that the parents have shared custody, and that they have the child equally much. Some politicians (and fathers right organizations) have also suggested that shared custody should become the norm.

There are comprehensive regulations for estimating child maintenance (usually paid by the parent not living permanently with the child).

## **2.3. Non-marital heterosexual relationships**

### **2.3.1. Is there law governing heterosexual cohabitation/ de facto relationships?**

There is one law regulating what should happen to a shared house and shared household contents when two or more persons over 18 years are dissolving a household (LOV 1991-07-04 nr 45 “*Law on right to shared house and shared household contents when a household is dissolved*”, in force from 1 Oct. 1991). This law can give the right to one of the persons to keep the house and the contents of the house, by paying the other(s) the costs of this. If they live in a housing cooperative, a household member has the right to keep the share in the cooperative (still by paying the others), even if it is written in one of the other’s names (LOV 1991-07-04 nr 45).

The Norwegian Christian Democratic Party (KrF) used this law as an argument against the Law on Registered Partnership under the debate prior to 1993. They argued that same-sex couples, as well as sibling families etc, did not need a new law when they had this.

Heterosexual couples living together outside of marriage were formally illegal between 1842 and 1972 (Sogner 2003:12). Up until 1800, the laws controlling births outside of marriage were far more extensive than laws controlling cohabitation. During the 19<sup>th</sup> century it became increasingly less criminal to give birth to babies outside marriages. At the same time cohabitation appears more clearly as a criminal offense in the law, and in 1842 a concubinage-paragraph was introduced in the criminal law. Historian Arne Solli suggests that this was a reaction to more widespread practice of cohabitation. Although the law remained, concubinage-cases were rare from the 1880s and 1890s. Solli interprets this as a sign of increased societal acceptance (Solli 2004). In the 1970s terms like “paperless marriage”, “cohabiting relationship” or “unmarried “samliv”” were the most common terms (NOU 1999:25). Not until 1972 was the Concubinage-Paragraph (§379 in the Criminal law) removed. The paragraph allowed for fines or prison for up to 3 months

for heterosexual couples living together outside marriage, but had been a sleeping law for decades when it was removed.

### **2.3.2. What are the rights and responsibilities of heterosexual cohabitants/ de facto partners?**

Without private arrangements such as wills and cohabitation-agreements, there are currently few rights or responsibilities between the partners in a cohabitating relationship.

### **2.3.3. Are there fiscal benefits and privileges for cohabitants/ de facto partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers' allowances, inheritance rights?**

The definition of cohabitants – of any genders - is usually that they have been registered in the Folkeregister/National Register<sup>19</sup> at the same address for at least two years<sup>20</sup>. If they have children together, that usually overrules the two year rule.

Before 1997/1998, cohabiting couples got higher retirement and disability pensions, because they were seen as individuals rather than a couple. Since 1997/98 cohabitating couples have been treated as married couples in this regard (Langseth 2001:61).

Retirement pension from the state is individual and does not include any survivor benefits for adults. Most employers are however obligated to have pension-agreements for their employees (Law on Mandatory Occupational Pension - OTP), and some also have private pension insurance. Many of these agreements will include survivor benefits. In most cases cohabitants and married couples will be treated equally (like in OTP), in some

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<sup>19</sup> Folkeregisteret, the national register of population keeps records of births, deaths, choice of names, changes of names, paternity, custody rights, adoption, addresses/moving, marital status, citizenship and work permits. Some of these changes (like birth and death) are automatically sent to the Folkeregisteret by the hospital/police, others are the responsibility of the members of the population. Every adult person is responsible to send in a form about their new address if they move. These forms can be found on the internet, at post-offices and at the local offices of the Folkeregisteret.

<sup>20</sup> In the proposal to changes in the Inheritance Act it is 5 years of living together that qualifies for cohabitation (see also 1.6, and Ot.prp.nr.73 (2007-2008))

agreements survivor benefits will only go to widows/widowers (also included same sex partnership). This depends on the actual pension agreement.

A cohabitating couple will be seen as separate individuals if applying for social security. That means a cohabitating person will get 50% of the living expenses (rent, food, electricity) independent of the economy of the other person (Langseth 2001:60).

**2.3.4. Are there social benefits and privileges for cohabitants/ de facto partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

Social housing is not based on marital status. “Next of kin” is the person the patient declares as her/his next of kin. This person is given all the rights and responsibilities concerning decisions etc. If the patient is unable to name the next of kin, the next of kin will be considered to be the person who has been in closest contact with the patient, and the following hierarchy should be considered: spouse, registered partner (same-sex couples), person living in a relationship resembling a marriage or registered partnership, children over 18 years old, parents or others bearing the parenthood responsibilities, siblings over 18 years old, grandparents, other family members close to the patient, or a guardian. (Informasjon om pasienters rettigheter, kap. 7)



### 2.3.5. How different from marriage are non-marital heterosexual relationships in terms of fiscal benefits and social benefits?

	Married couples and registered partners	Cohabitants
Married Couple's Allowance	Yes	No
Capital gains tax exemption	Yes	No
Benefits on Inheritance tax	Yes	No
Automatic Inheritance	Yes	Sometimes (if you have children or have lived together more than 5 years, see 1.6)
Access to deceased partner's bank account	Yes (if not special agreement, see 1.13, "private ownership")	No
Bereavement benefits	Yes	Sometimes (see 1.6)
Welfare benefits	Yes (see 3.3)	Yes (see 3.3)
"Nearest relative" <i>in health care system</i>	Yes	Yes
Protection from domestic violence	Yes	Yes
Adoption rights	Yes	No
Fathers parental responsibility	Yes	Yes

### 2.3.6. What is the law (if any) regarding domestic violence, and what are the policy initiatives to combat it?

Although spouses are mentioned explicitly in the criminal law §219 covering domestic violence, cohabiting partners would be covered under "someone in the household" (see same point under marriage).

### **2.3.7. To what extent are the two parties to a cohabitation/ de facto union treated as a couple/ unit, and to what extent are they treated as individuals?**

During the last years, cohabitants are increasingly treated more and more like a couple, particularly if they have children. Cohabitants are generally treated as individuals in regard to economic and judicial matters, but also have some rights in regard to pensions and inheritance (soon, see 1.6). They are also treated as a couple as parents, as next of kin etc in encounters with authorities.

Sociologist Liv Syltevik argues that cohabitation has become a normative part of the life course in Norway. While cohabitation was formally illegal between 1842 and 1972, it is now recognized by the state and accepted in a national context (Syltevik 2008 – in review). Syltevik argues that although cohabitation can mean different things to different people, Norwegian couples now see cohabitation as the right and proper thing to do at the start of a relationship. The informants in Syltevik's study report that they meet mild assumptions that they eventually will marry from family and friends, “but there is no question of being excluded or sanctioned” (Syltevik 2008 - in review). Syltevik also argues that “love and long-term commitment still plays a hegemonic role” and that “cohabitation does not represent a break with the ideal of the long-lasting relationship between two partners” (Syltevik 2008 – in review).

## **2.4. *The Regulation of Sexual Practice***

### **2.4.1. Has homosexuality and lesbian sexuality been criminalized? What was illegal? What is the history of decriminalization?**

Sexual relations between men have been illegal in Norway from about 1100 until 1972. Sexual relations between women have never been illegal. In the Norse era (700-1350 - also known as the Viking era) accusations of unmanliness was the worst form of defamation. The term Ergi was used to describe unmanliness or weakness, and it was often used to describe a man who "let himself be used as a woman", the "passive partner" in an anal intercourse. In the middle-ages the understanding of sex between men as Ergi, was replaced by a Christian based understanding of sex between men (and between men and animals) as sodomy or "fornication against nature". In the late 19th Century this understanding was again replaced by an understanding of same-sex relations as a disease (all the above from Jordåen 2003), which again was replaced during the 20th century by an understanding of homosexuality as an inborn disposition (legning), which was no longer seen as a disease (e.g. Stenvoll 2002). A new law concerning male homosexuality was introduced in 1902. It stressed that homosexuality was only to be prosecuted if the actions performed did public damage (Jordåen 2003:38-46 and Halsos 1999). In this regard the law differed significantly from laws on homosexuality in many other countries (e.g. Sweden), and it meant that only very few cases of homosexuality were taken to court. During the debates around the new law in 1902 some suggested that also sex between women should be included in the new law. A prominent cabinet minister then declared: "Sexual relations between two women – have you ever heard such a thing? It is an impossibility" (Jordåen 2003:39). The modern homosexual identity-movement can be traced back to 1950, when a branch of the Danish homophile organization "Forbundet af 1948" was established in Norway. According to activist Arne Heli, The Danish organisation was named as a reference to the UN declaration of Human Rights from 1948 (Heli 2006). In 1952 the Norwegian branch was formalized as a separate organization with the name "Det Norske forbundet av 1948/The Norwegian Association of 1948" (DNF-48). DNF-48 immediately started to work to remove the paragraph making sexual

relations between men illegal. In March 1972 removal of §213 was passed in Stortinget /the parliament. No new paragraphs on the issue were introduced (Jordåen 2003:93-97).

#### **2.4.2. What is the age of consent (hetero/ homo)?**

The age of consent is 16 (for everyone).

#### **2.4.3. Is incest illegal? What is its definition?**

Three paragraphs in the Criminal law deal with incest (§197, §198 and §199). The law states that sexual relations between close family-members in directly vertical or horizontal lines, or between an adult in the role of a parent and a child are prohibited.

#### **2.4.4. What is state policy around sex education in school?**

The Department of Education and Research states that *samliv* (living together) and sexuality is a central and crucial area for education. This education will take place in cooperation with the homes of the pupils, but the education given by the school can conflict with the values and practices in the individual pupil and in the individual home (Rettigheter og plikter i den offentlige grunnskolen/Rights and duties in the public schools, 2008). More specific plans for this education are to be found in the curriculum for the 10-year compulsory school in Norway. The gender-researcher Åse Røthing argues that although the intentions in sex education often is to perform anti-discriminatory teaching, the focus on “differences” like homosexuality tends to be education “about the others” (Røthing 2007).

#### **Comment:**

- While the first feminist wave in Norway (approx. 1880-1910) was very much opposed to sex education, access to abortion and contraceptives, this changed after the millennium when working-class and socialist women started to join the feminists.
- In August 2008, Berger Hareide, Director in the Norwegian Directorate for

Children, Youth and Family Affairs, was on the national news campaigning that samliv (living together) should be a mandatory field in upper secondary education. It was implied that it is heterosexual couples that should be helped to live happily together. Asked why this teaching could not be an optional course, he answered that then there would be 90% women. Berger Hareide is also one of the pioneers of introducing “marriage classes” in Norway, and trying to make them mandatory for first time parents. These classes are now run by the state and offered to first time parents (Danielsen 2008, Danielsen and Mühleisen 2009).

#### **2.4.5. What is the law concerning prostitution – is it legal/ tolerated/ illegal? Who is prosecuted (the prostitute or the purchaser of sex)?**

In regard to prostitution, what has been illegal in Norway is:

- a) to encourage and publicize others prostitution
- b) to rent out housing/rooms used for prostitution
- c) to publicly offer, arrange or demand prostitution

(Criminal Law § 202, § 224)

Prostitution is defined as a person having sexual relations (defined to include a wide range of sexual activities) with another for payment (Criminal Law §202).

#### **2.4.6. Is there a public debate about prostitution, and if so, what are its parameters?**

Currently there is a heated debate around the proposal to make it illegal to buy sex. While most of the organisations for prostitutes are strongly opposed to this (arguing that it will make it much harder, and much more dangerous for women working as prostitutes), it has been more and more accepted that the general feminist/political correct standpoint should

be prohibition. Among academics and professionals working in the field there are also highly different views (Sørbø et. al. 2007). On 22 April 2007, the Labour Party (after fierce debate) voted in favour of a new law. That means this standpoint has majority in Stortinget, and the work to prepare a new law has already started.

**Comment:**

I would claim that the most visible feminist groups in Norway in the 1990s were the groups working against pornography and prostitution. *Ottar* was the main organisation, but you also had more ad hoc groups working to name customers, disclose brothels, stop topless-shows, destroy pornography etc. These groups seemed to recruit a lot of young women, and with their angry activist ways they were very popular in the media.

#### **2.4.7. Is there policy around trafficked women?**

July 2003 a new paragraph, §224, in the Criminal law became active. This paragraph made it possible for Norway to ratify the UN protocol against human trafficking, Palermoprotocol. The new paragraph is accommodated to target the persons behind trafficking (LOV 1902-05-22 nr 10). The Government has also developed several Action Plans meant to prevent trafficking and help victims of trafficking (Regjeringens handlingsplan mot menneskehandel 2006-2009)

## **2.5. *Same-Sex Partnerships***

### **2.5.1. What is the age of consent?**

The age of consent is 16. The age of consent has never been different for homosexual and heterosexual acts, although this was debated in the 1950s and 1960s.

### **2.5.2. What is the history around the age of consent?**

The first organisation for homosexuals was founded in 1950 (DNF-48) it immediately started to work to remove the paragraph making sexual relations between men illegal. In 1953 the committee of the penal code suggested removing the paragraph, but they then wanted the age of consent raised to 18 (instead of 16 as for heterosexual relations) and to prohibit “homosexual propaganda”. The fear of the spreading of homosexuality was behind these discussions. The organisation DNF-48, felt that this was worse than the existing (mostly sleeping) paragraph, and the work for decriminalization died down. In the late 1960s it was taken up again, and in March 1972 removal of §213 was passed in Stortinget (Odelstinget) with 65 votes to 13. No new paragraphs on the issue have been introduced (all from Jordåen 2003:93-97).

### **2.5.3. Is there provision for the recognition of same-sex partnerships (or are same-sex partners “legal strangers”)?**

In 1993 the Law on Registered Partnership was passed in Stortinget which gave the same right as marriage apart from the right to apply for adoption and the right to marry in church. The Law on Registered Partnership gave the same rights and responsibilities concerning tax, social security and unemployment benefits, pensions and survivor benefits, carers’ allowances, inheritance rights as marriage.

In June 2008 a new gender-neutral Marriage Act was passed. It will be in force from January 2009. This law makes same-sex and different-sex couples equal with regard to marriage.

The new Marriage Act makes the Law on Registered Partnerships redundant. Couples already registered under the law can ask to have their registered partnership altered into marriage by the register office authorities. Those who do not ask for this alteration remain registered partners (Innst.O.nr.63 (2007-2008)).

**2.5.4. If so, what is it called – and has there been a debate about whether it should be “marriage” or not? Outline the parameters of the debate in parliament, and in the media, and who the key players were/ are, including religious groups, if applicable.**

The Law on Partnership became a reality after a lot of work from LLH (The Norwegian National Association of Lesbian and Gay Liberation) in an alliance with the Labour Party. The other main socialist party (SV) had long been in favour, and among the conservatives and liberals attitudes were changing. Most parties let their representatives vote individually in this case. Only the Norwegian Christian Democratic Party (KrF) was 100% opposed to the proposal.

The public debate around the issue was huge. The debate was mainly pro-gay (in favour of the law) and anti-gay (opposing the law). There was almost no debate, either public or “internally”, on whether this was really something the lesbian/gay movement wanted to prioritize, and very few voices speaking up against marriage in general.

The proponents of the new gender neutral Marriage Act have mainly been the Labour party, the Socialist party (SV) and LLH (The Norwegian National Association of Lesbian and Gay Liberation). The visible opponents are mainly extreme Christian Conservative Groups, but also two political parties (the Norwegian Christian Democratic Party (KrF)



and the Progress Party (FrP) voted collectively against the law. Still the debate on a gender-neutral marriage seemed a lot less heated than the debate on the Law on Registered Partnership.

#### **2.5.5. If there is recognition, what does it entail? Rights and responsibilities?**

Registered same-sex partners had the same rights and responsibilities as married couples, except: 1. They had no right to apply for adoption or to get assisted conception 2. They had no right to perform the registration in a church.

With the new gender neutral Marriage Act, married same-sex persons will gain the right to apply for adoption. Lesbian couples will also gain the right to get assisted conception. The Law on Biotechnology (§2-3) will be altered to accommodate this. If a child is conceived by two women living in a marriage, and the two agree that one of them gets assisted conception, the non-biological mother will automatically be given parental rights when the child is born. This person will be called *medmor* (“joint mother”) (Innst.O.nr.63 (2007-2008, chapt.2.5). Issues regarding parenthood and children were the most controversial part of the new law. It will be up to the different religious communities to decide if they will perform same-sex marriages.

#### **2.5.6. Are there fiscal benefits and privileges for registered same-sex partners?**

The fiscal benefits and privileges are the same for registered/married same-sex partners as for different-sex married couples.

#### **2.5.7. Are there social benefits and privileges for registered same-sex partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

Social benefits and privileges are the same for registered/married same-sex partners as for different-sex married couples.

#### **2.5.8. Is there recognition of same-sex domestic violence, and are there policy initiatives to combat it**

There is no particular focus on domestic violence in non-heterosexual relationships. In the statistics from the Women's Shelter Movement in Norway, 4% of the users state that their offender was a woman. There are however, no statistics to show what kind of a relationship there was between the victim and the offender.

#### **2.5.9. Which terms were/are used to describe homosexuality in the law?**

The Law on Registered Partnership states that “Two *homophile* persons of the same kjønn (=sex/gender) can register as partners (§1). The new gender-neutral Marriage Act only states that “*two persons of opposite or same sex can enter into marriage*” (§1). In the preparatory papers to the Storting (Parliament), it says that since the old marriage law did not say anything about *sexual orientation*, the new law will not do so either. So while the Law on Registered Partnership stated that the same-sex couple had to be “homophiles”, the new law does not demand a specific sexual orientation from anyone (Innst.O.nr.63 (2007-2008)).

## **2.6. Parenting and Reproduction**

### **2.6.1. How are mothers/ parents supported financially and socially by the state? (tax allowances, maternity leave, parental leave for fathers/ partners, for care of older children, child benefit, child care provision).**

There are 3 main support systems for parents with children:

1. Parental benefits (paid parental leave) 2. Cash benefit scheme (kontantstøtte) 3. Child benefit (barnetrygd) (most of the following information is from the booklet *The rights of parents and small children*. English 2007)

- **Parental benefits (parental leave)** is meant to secure an income for parents when having a child through birth or adoption. Those receiving parent money must actually care for the child, and not be working. The state supports parents with up to 44 weeks full salary after childbirth.

To have the right to parental benefits you must have been working and paying tax for at least six of the last ten months (before the support period starts). The parental benefits will be equal to your regular pay. For the highest incomes however, there are no parental benefits deducted from what exceeds what is seen as “normal income” (6xG) (In 2006: 377 352 NOK (= 47 169 Euros)). People earning more than 47 169 Euros would have their parental benefits based on this amount, rather than their actual income.

The period covered is 54 weeks at 80 % of salary, or 44 weeks at 100%. For adoption the support period is 51 weeks at 80 % coverage, or 41 weeks at 100%.

Six weeks of the support-period is exclusively for the father. Individual employers decide if this also applies for same-sex partners. In addition 29/39 weeks of the support-period can be divided between the parents. If only the father has the right to parental benefits, he can collect money for 29/39 weeks.

In cooperation with the employer, the parental benefits can be used flexibly, it does however have to be used within 3 years. Women who have not earned right to parental benefits receive a one-off payment. In 2007, the one-off payment is 33 584 kroner (4198 Euros) per child.

- **Child benefit**

Child benefit contributes to the cost of raising children. The money is paid for all children under 18 years old. A single parent with children under 18 years has the right to extended child benefit in the form of payment for one child more than she/he actually cares for. A single parent with children between 0-3 years, also receives a special "baby-support" until the child is 3 years old. For children in the farthest north of Norway extra support is given.

<b>Child support</b>	<b>Per month</b>	<b>Per year</b>
Regular child-support	970 (123 Euros)	11 640 (1455 Euros)
<b>Additional</b>		
"North-support" for Finmark and Svalbard	320 (40 Euros)	3 840 (480 Euros)
"Baby-support" for single parents	660 (83 Euros)	7 920 (990 Euros)

- **Cash benefits scheme**

The Cash benefit scheme is meant to help the families of small children that prefer one of the parents to stay at home instead of using publicly supported day care (there are also long waiting lists to get your child into daycare). The right to cash support is valid from the month after the child is born (or adopted) and for 23 months forward.

Support rate 2007		
Time in kindergarten per week	Percentage of cash benefits given	Sum per year
No time in kindergarten	100 percent	39 636 NOK (4954 Euros)
Max 8 hours	80 percent	31 704 NOK (3963 Euros)
9-16 hours	60 percent	23 784 NOK (2973 Euros)
17-24 hours	40 percent	15 852 NOK (1981 Euros)

- **Prenatal care**

Almost 100% of pregnant women follow the official program for mothers to be. The directories for this can be found in NOU 1984: "To prevent medicalisation of pregnancies, the guidelines proposes eight check-ups before week 40, and one in week 41 and if necessary a late-consultation. If the woman wants check-ups more often, she is entitled to them."

- **Kindergarten**

About 80% of all 1-5 years old were offered kindergarten in 2006. The governmental goal has long been to have 100% coverage. Kindergarten is organised through private or public institutions, where parent payment goes hand in hand with public money. Families with special needs can get free kindergarten. The maximum price for 1 months childcare for 1 child is 250NOK/ 281 Euro/187£ (2007)

### **2.6.2. What is the law about registering the birth of a child, and its parents? Who is the father (biological father versus partner of mother etc)? How important is biological versus social parenting, and has there been a debate about this?**

The Children Act was sanctioned in 1981 and is the main law dealing with the relationship between parents and children .The "pater est" rule holds that the man married

to the mother at the time of birth is the father of the baby (§3 in the Children Act). The new gender neutral marriage law will state that if a lesbian couple uses assisted fertilization, the non-biological mother will gain the status of ‘medmor’ (“joint-mother”) and get full parental rights when the child is born if: a) she has consented to insemination b) the insemination has taken place at an approved health institution in Norway or abroad c) if they have used a known donor (Barne- og likestillingsdepartementet 2008b). For fathers not married to the mother of the baby, they are asked to consent to the fatherhood (in writing) when they take part in the birth (§4). The current government wants to change this so fathers can register ahead of birth if that is more convenient (this can also take place at any time after the birth). The official form establishing paternity must be sent to the Folkeregisteret/National Register (skattekontoret) either by the hospital where the birth takes place, or by the parents themselves.

In cases of unknown fatherhood the authorities have a responsibility to try to decide who is the father (§5). In the government pamphlet *Fatherhood and Parent Responsibility* one can read:

“It is the duty of the authorities to decide fatherhood when this does not follow of marriage, or when it is not admitted. If the fatherhood is not admitted, the office for Child support (Bidragfagden/Trygdekantoret) will call for the man named by the mother as the father. If no admittance is given, or if the mother has given different names, a blood-test can be used to decide the fatherhood”.

The original rationale for §5 (1981) was probably the fathers duty to pay child maintenance. In accordance with the ”biological parenthood turn” the last decades, it now might also be seen as a service for the child, to help it learn about its true father. There is no focus on unknown paternity in the political/bureaucratic discussions around parenthood, nor is it mentioned in the extensive proposition on possible changes in The Childrens Act. What is mentioned there is that since the state advance the child maintenance to the parent entitled to it, the maintenance-debt is considerable. However,

the proposition also underlines that 85% of the persons liable to pay maintenance actually do so (Ot.prp. nr. 43 (2000-2001), point 2.3.4). Given the absence of unknown paternity as a problem in official documents, it is not likely that the authorities will pursue the case in cases where the mother does not give the name of any possible father,

In 1997 there was a major revision of the Children Act. The revision in 1997 dealt with right of access after divorces, but also established that:

- The woman giving birth to the child is the mother of the child (making surrogacy impossible in Norway)
- The pater-est rule is not in force when the couple is officially divorced
- A man knowing/suspecting himself to be the father of a child can now go to court even if the child already has a judicial father
- If the divorced parents have shared parental responsibilities, the child automatically goes to the other parent if one of them dies
- When parents are cohabitating and the mother has full parental rights, the father will automatically be given custody if the mother dies

(Rundskriv Q-18/97 10. December 1997)

- **New law on biotechnology 2003/2004:**

Since 2004 sperm donors must give their identity and persons who are born from in vitro fertilization have the right to know the identity (from the register) when they turn 18 years old. Heterosexual couples who were artificially inseminated until as recently as 2002, were advised by the hospital to keep it hidden from the child, and to pretend that the child was conceived in a conventional way. A biologically based reasoning has become increasingly common in Norway over the last decades. At the same time, the so-called “pater est” rule existed until the recently revised law of biotechnology was implemented (2002). The “pater est” rule held that the man married to a mother at the time of birth is the baby’s father.

### **2.6.3. What is the law concerning abortion? Give a brief history.**

As early as 1913, socialist feminist Katti Anker Møller wrote that abortion should be legalized. However, until 1964 it was still illegal to have/perform abortions in Norway. Abortion on "medical grounds" (also eugenic grounds) were performed. In 1964 the first law that introduced legal abortion based on application from pregnant women was passed. Women seeking abortion could then present their case to a committee. The committee consisted of two doctors and a social worker who decided who could get and who could not get an abortion. These committees became a big offence to the new women's movements and abortion became one of the unifying causes of the movements, and in 1974 a feminist coalition was formed to work for "free abortion" until week 12 in the pregnancy. In 1978 the woman's right to decide whether she wanted abortion or not was decided in Stortinget, with only one vote in majority (all the above from: [www.kampdager.no](http://www.kampdager.no)).

Today the same law applies: until 12 weeks a woman can freely choose to have an abortion. If the woman is under 16 years old, her parents will be notified.

After week 12 the woman can apply for an abortion through an abortion committee. Two doctors make the decision. The law does not set a time-limit for abortion, and abortion researchers argue that week 22 seems to be the current moral limit within hospitals. This limit can be extended if unusual circumstances. Abortions are usually permitted until week 22 if the woman's health or life-situation make it necessary, if the child has a high risk of serious injuries, or if the woman is underage or pregnant as a result of rape (Syse 1993).

In 2005 the abortion-rate among women in their fertile years was 12,9 pr 1000 women, in 2000 it was 13,7 per 1000. There are significant regional variations, with the highest numbers in the northern part of Norway. The age-group 20 - 24 years has the highest percentage of abortions with 27,4 pr 1000 in 2005. The age group 15-19 had 15,4 pr 1000



in 2005, 20.1 pr 1000 in 2000.

- **Current abortion debate**

The current abortion debate focuses mainly on selective abortions and on the Labour Party's women's organisations proposal to extend the limit of general abortion to week 16. There seem to be a consensus about selective abortions (based "on abnormal" fetuses) being ethically problematic. The medical profession is the main group voicing the need for the possibility of selective abortions.

I would claim that the most accepted attitude to abortion in Norway today would be to see abortion as something sad and unwanted (and something you rarely talk about if you've had one), but still as something that should be a woman's free choice. The Norwegian Christian Democratic Party (KrF) is still officially working to change the law and make it a lot harder to get an abortion. At the moment this is an unrealistic political goal, and it is not a high profile political cause. In the national public domain KrF does not front this cause. There are also groups and organisations working against the liberal abortion law. Among the most visible has been a group led by priests who were fired from the Church of Norway for their methods used against the abortion law and their disobedience towards their bishops. They have had a high media-profile. They have used bloody baby dolls for effects, tried to block hospital wards where abortion are performed, and also perform in old fashioned priest robes. They seem close to some of the US anti-abortionists. For the parliamentary elections of 2005, this group presented their own list, where total prohibition of abortion was their only issue. They wanted all fertilized eggs to be protected by the law, and thus intrauterine contraceptive device would also be illegal. The Anti-abortionists List got 1 934 votes in the 2005 parliament election, which equaled 0,07 % of all the votes. No representatives got into the parliament. They will try again in the elections in 2009. On their homepage they states that "feminism kills" above a photo of a bloody fetus ([www.abort.no](http://www.abort.no), accessed 23.09.2008).

The organisation Amatheia (used to be named: Alternative to Abortion) is also working

against the law, but they work mainly through offering women counselling and practical help when they themselves unwantedly pregnant.

Occasionally you hear voices in public talking about the role/rights of the fathers in regard to deciding to have an abortion. This is, however, not a strong voice and I would say that the role of fathers is peripheral in the Norwegian abortion discourse/debate.

In the fall of 2008 the abortion debate again became visible in the Norwegian public, through a series of feature articles written by researchers/academics as well as authors, clergy and people sharing personal experiences. The newspaper Aftenposten (Oslo) was the main arena for this debate, but it also initiated debate in other foras. The debate is not primarily focusing on judicial issues (mostly consensus to keep the existing law), but on whether or not it is morally wrong to abort fetuses, and if it harms the women doing it or not.

#### **2.6.4. Is there policy/ public debate around teenage pregnancy?**

The debate on teenage pregnancies in Norway is practically absent, probably because it is non-existent as a social problem (I would claim). Since the beginning of the 1990s the percentage of teenage pregnancies has been halved, and teenagers now constitute less than 5% of all first time mothers.

The government claims that the primary prevention strategies in the age-group 15-19 build on:

- Easily available information and education focusing on body, sexuality and contraception
- Easily available advice and counselling. Youth clinics with a drop in service or time-reservation through sms. Internet advisory clinic: [www.klara-klok.no](http://www.klara-klok.no)
- Easily available contraception for girls 16-19 years. Condoms and contraception-pills are free, other means are heavily subsidised. Pills usually have to be

prescribed by doctors, but girls can get contraception from their school-nurse and the youth-clinics.

#### **2.6.5. Is there policy/ public debate around delayed motherhood?**

There is not really a public debate around delayed motherhood, although there are regularly physicians warning about this in the media (see 9.1, where cancer concerns regarding delayed motherhood is discussed). The average age for giving birth to ones first child was 28,1 year in 2006 (SSB – Gjennomsnittelig fødealder 1946-2006).

#### **2.6.6. Is there any policy/legislation defining an “appropriate” age for motherhood?**

There is not really an audible public debate about this.

#### **2.6.7. How is adoption and fostering regulated? (by the state or private agencies?)**

Fostering is state regulated and taken care of by the state. The Act on Adoption and governmental regulations and guidelines constitute the legal framework for adoption in Norway. Adoption is managed through cooperation between the state and three private adoption organizations. The Act on Adoption, §5, states that people: “Other than spouses cannot adopt” (only married couples). The authorities and the private adoption agencies take care of different parts of the adoption process. Potential parents have to apply to the authorities to get approval to go ahead with the process. The authorities will clarify if the applicants are fit parents, this will be done by interviews and home visits.

If they are judged as “fit” parents, one of the adoption agencies can get them a child. The adoption process cost approximately 90 000 NOK (=11 250 Euros) (2007) + travel expenses for the people (usually both parents) who travel to pick up the baby. In 2007 the state supports an adoption with 38 000 NOK (=4750 Euros).

- **Intercountry adoption in Norway**

Anyone who wants to adopt a child from abroad must apply for advance approval from the authorities to do so. After that they can contact one of the three accredited adoption organizations in Norway. In 2001 approximately 900 children were adopted in Norway, 721 of these children were foreign, and the majority of Norwegian born children adopted were stepchildren. Among the children adopted from foreign countries, 23 % came from China.

Before the application can be sent to the country of origin of the child the family must first contact the Child Care Office or Social Office (or any other municipal authority in charge of these matters) in the municipality where they live, and register themselves as applicants. The competent authority will then make a home study of the family, interview them and write a social report on the applicants, consisting of two parts:

- (1) A summary of the applicants' background, marriage, everyday life, interests, motives for wanting to adopt a child from abroad etc, and
- (2) a description of the social worker's impressions of the family and their capabilities to become parents by adoption. The report must end with a recommendation whether the family should be given an advance approval to adopt a child or not. This recommendation must be based on what could be considered the best interest of the (unknown) child.

According to regulations, persons over 45 years will not easily be allowed to adopt. There are, however, certain exemptions to this regulation, for example if one of the spouses is considerably younger than the other, or if the family already has adopted a child. The applicants must have a normal/good health both physically and mentally, and a stable financial situation. They must have a good conduct and a clean police record. Those who apply together must be married, and the marriage should have lasted for a minimum of two years. Persons living in registered partnership cannot apply to adopt a child from

abroad.

### **Comment**

It is seen as HIGHLY immoral for a woman in Norway to give away her child for adoption. The logic which seems to be present in certain US contexts where mothers-to-be put in adds to get good adoptive parents for her child, is totally unheard of in Norway. "The best interest of the child" is thus evaluated totally opposite in those two contexts

### **2.6.8. Who are seen as fit parents?**

Who are seen as fit parents has varied through Norwegian history. A new law on sterilisation was sanctioned in 1934. This gave the state the right to sterilize selected inhabitants for social and eugenicist reasons. Social reasons were directed towards people who by their own work were not able to support themselves and their offspring. The eugenicist reasons were directed towards people with a "A sick condition of the soul or considerable physical default which could be transferred to the offspring" ("En sykkelig sjelstilstand eller en betydelig legemlig mangel ville bli overført på avkom.") (Haave 2000) The law was sanctioned in Stortinget with only one vote opposing it. The law was based on the work of a committee that delivered its recommendations in 1932. IQ tests were performed on children of "travellers"/Romani in orphanages. Their average IQ was said to be 78 "on the level of negroes, Indians and Mexicans". The committee warmly recommended a law which made it possible to sterilize inferior individuals" (Haave 2000). Travellers/Romani (tater) were one of the groups that were hit by these laws. Special work camps were established where tater were interned. Children of tater were often taken away from their parents and placed in orphanages. Sterilization was also used. Between 1934 – and 1954, 3 709 women and 420 men were sterilized in Norway. 109 travellers/Romanis were among these (Haave 2000). Most of the sterilizations took place after 1945 (after WWII). Most of these were categorized as voluntary sterilizations. The degree of voluntariness may be assumed to be highly varying. 76% of the forced

sterilizations were committed on persons considered "lightly retarded", 11% were diagnosed as "mad" and the rest were considered psychopaths and epileptics (Haave 2000).

Based on several terrible "incidents" in recent years, a new regulation (January 2007) states that the remaining parent is not automatically given the parental right if they have caused the other parents' death. All such cases have now to go to court.

The Child Welfare Act (1992-07-17 nr 100) states that the authorities can take over the care of a child if:

- a) "The daily care is seriously lacking, or serious shortcomings in the personal contact and stability they need at their age and developmental stage.
- b) If the parents don't make sure that a child that is sick, handicapped or have special needs do not get the necessary treatment and training
- c) If the child is abused or victims of other serious assaults at home
- d) If it is highly probable that the health or development of the child will be seriously harmed because the parents are unable to take proper care of the child, (§ 4-11)

This kind of decisions can only be made if satisfactory conditions can not be reached through other means.

- **Sterilization today**

The Law on Sterilization states that persons of 25 years of age living in the country can ask to be sterilized. In cases of persons with severe mental disabilities they and/or their guardians can apply for adoption when they are 18 years old (LOV 1977-06-03 nr 57, §1 to 3).

#### **2.6.9. Who can adopt (married couples, single women/ men, cohabiting couples, same-sex couples)? Is there adoption leave?**

Married – not cohabitating or registered partner – couples are allowed to apply for

adoption. Single persons have increasingly – although still extremely rarely - been allowed to apply for adoption since 1998.

The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) states:

”Single persons with special resources in regard to a child can apply. Special resources include a good and stable network of family and friends, consisting of both genders. The thought is that this in some ways can compensate for the fact that the child will not get two parents/families through the adoption”.

#### **Comment**

The adoption regulations seem to promote a more narrow understanding of a family than many other parts of the intimate-policy arena. There can be several reasons for this, but one of the reasons is the criteria set by the nations putting up their children for adoption. No countries currently “delivering children” to Norway accept same-sex couples as parents (Adopsjonsforum, FAQ, [www.adopsjonsforum.no](http://www.adopsjonsforum.no), accessed 23.09.2008). Following increased demand, China has recently tightened their criteria. They no longer accept single or overweight (over BMI 40) applicants (Verdens Barn, [http://verdensbarn.no/tema\\_Kina.nml](http://verdensbarn.no/tema_Kina.nml), accessed 23.09.2008)

#### **2.6.10. Does the state provide access to assisted conception (donor insemination, IVF etc)?**

The state does provide treatment. It has however been debated whether this treatment should be seen as necessary medical treatment, and thus be free, or if it should be paid/or partly paid by the patients themselves. Currently couples have to pay a substantial part of the costs themselves (for IVF: 1500 kr/182 Euros for each attempt, 15000 kr (=1827 Euros) in medication).

### **2.6.11. If so, for whom?**

Since the new law on biotechnology from 2003, assisted conception has been allowed for stable cohabitating heterosexual couples as well as for married couples (until then, only married couples) (LOV 2003-12-05 nr.100, §2-2). In 2007 the Committee of ethics suggested that also lesbians should be allowed to be in vitro impregnated. This was not treated as a separate proposal as it would be a given if a new law of gender-neutral Marriage Act passed. As it did.

Egg-transplantation is not legal in Norway. Since 2003 the former rule on anonymous sperm-donors has been changed to no option of anonymity. All children conceived from donor-sperm are now entitled to get the name of the donor when they turn 18 (LOV 2003-12-05 nr.100).

### **2.6.12. Is there legal regulation of private provision of assisted conception? If so, what is the nature of the regulation?**

All assisted conception is regulated by the Law on Biotechnology (LOV 203-12-05 nr.100).

### **2.6.13. What is the law concerning surrogacy?**

Surrogacy is prohibited in Norway, as in the rest of Scandinavia. The Children Act, §2, also states that the mother of a child is the woman giving birth to it, thus making surrogate mothers legally impossible (LOV-1981-04-08-7).

#### **Comment:**

In a heated newspaper debates of the summer 2002, the issue was the upcoming birth of celebrity-lesbian, crime writer and ex-Minister of Justice, Anne Holt's (partners) baby. The profiled Christian-Conservative politician Valgerd Svarstad Haugland criticized the couple for evading Norwegian law and travelling abroad to have the insemination: “- Just because two celebrities are in focus, nobody focuses on the fact that insemination [for lesbians- my comment] is prohibited in Norway. They know very well what the Norwegian law says, and they know what they have done, Svarstad Haugland says to Dagbladet” (Dagbladet 10.07.2002)



## **2.7. Homosexuality and Anti-Discrimination Legislation**

### **2.7.1. Is there law against discrimination on the grounds of sexuality/ against lesbians and gay men?**

Norway has one major law on equality, the (Gender) Equality Act of 1978. The law only sets out to hinder discrimination based on gender. Discrimination towards lesbians and gays is partly taken care of through:

- The Working Environment Act (Chapter 13)
- The anti-discrimination provisions in the Tenancy Act, Owner-Tenant Act, Housing Cooperative Act and Home Building Association Act

These are the only laws that explicitly make it illegal to discriminate homosexuals (several different words are used, like “homophile legning”<sup>21</sup> and “sexual orientation”). Other forms of discrimination can be addressed through other laws (violence through the Criminal Act), The Equality and Anti-discrimination Ombud was established in its current version January 2006. On their web-page they claim that: “The Ombud contributes to the promotion of equal opportunity and fights discrimination. The Ombud combats discrimination based on gender, ethnic origin, sexual orientation, physical handicap and age. The Ombud upholds the law and acts as a proactive agent for equal opportunity throughout society” ([www.ido.no](http://www.ido.no), accessed 23.09.2008). The current ombud, Beate Gangsås, officially describes herself as a lesbian, and she has fronted a particular focus on lesbians/gays and handicapped.

### **2.7.2. Is there recognition of the problem of anti-gay violence/ hate crimes? Are there policy initiatives to combat it?**

In the Norwegian law, hate-crimes are mainly defined as ”utterances”. Hate-actions are taken care of in other parts of the law, but The Criminal Act §135a states that it is illegal to utter a hateful or discriminatory statement concerning:

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<sup>21</sup> See 2.15 Norwegian Concepts of Intimate Citizenship

- skin colour, national or ethnic origin
- religion
- homophile legning, life form or orientation

The punishment could be fines or up to three years imprisonment.

The current government (2007) wants to strengthen the work against hate-crimes, and has given LLH (= The Norwegian National Association of Lesbian and Gay Liberation) money to map out the extent of hate crimes. The Equality and Anti-discrimination Ombud are pushing for the government to also focus on hate-crimes toward disabled people and to include this group into the existing laws.

## **2.8. *Immigration and Intimate Relationships***

### **2.8.1. Is there a right to “family reunion”?**

Family immigration means that a family member abroad may come to Norway to live with a family member who already lives in Norway, or who is to settle here. To be granted a permit for family immigration, certain requirements must be met by the foreign family members applying for a permit and by the person in Norway they are applying to join. In addition the person who is settled in Norway must be able to ensure subsistence and housing for those applying for family immigration. Separate rules apply for citizens of EU/EEA countries. Individuals coming to Norway by family immigration do not get independent residence permit until three years have passed. In cases of marriage, permanent residence permit will usually be denied if the marriage is dissolved, if it is exposed as a pro forma marriage, or if the Norwegian partner dies within these three years<sup>22</sup>.

You can be granted a family immigration permit if you are one of the closest family members of the person who lives in Norway. Here “closest family members” are defined as:

- A spouse or registered partner over 18 years of age, where the couple are to live together in Norway
- Cohabitants over 18 years of age, where the couple have lived together for at least two years and intends to continue their cohabitation
- Children, where both parents are, or are going to be, legally resident in Norway
- Children who only have one parent settled in Norway. It is a requirement that the parent living in Norway has sole parental responsibility or, if parental responsibility is shared, that the other parent gives his or her consent
- Adopted children with adoptive parents in Norway, where the consent of the Norwegian Directorate for Children, Youth and Family Affairs is given before entry

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<sup>22</sup> See Halsaa, Predelli and Thun 2008 for a more extensive debate on this.

- Parents and siblings under 18 years of age of a child who is a resettlement refugee or who has asylum status in Norway
- The mother or father of a Norwegian child. He or she must permanently live with the child and have parental responsibility for the child. The mother or father must not have a spouse or cohabitant when he or she comes to Norway
- A mother or father who has access rights to a child who lives in Norway with the other parent. The person must have lived in Norway with a permit for the previous year”

(Norwegian Directorate of Immigration. Who can apply for family immigration?

<http://www.udi.no/templates/Tema.aspx?id=7411> Accessed 23.08.2008)

### **2.8.2. What is the law/ policy about immigration for the purposes of marriage?**

There is a special clause for the cases where a person immigrates for the purpose of marriage or partnership. They can get a so-called “fiancé permit”. If granted the foreigner “will be given a six months work and residence permit and during this period marriage or partnership must be contracted. If marriage is not contracted during the time you have a fiancé permit, you must leave Norway. This type of permit falls under the same regulations as that of family immigration” (UDI 2007. Fiancé permit (get married or enter into partnership). <http://www.udi.no/templates/Tema.aspx?id=8413>. Accessed 23.09.2008)

### **2.8.3. Do unmarried and same-sex couples have the right for the non-national partner to immigrate?**

See explanation above.

## **2.9. *Single People and Solo Living***

### **2.9.1. Is there any public/ policy debate about the rise in solo living?**

There is a certain debate around single people, although it is quite subtle. It has been argued that one can find some similarities between the warnings toward single women of today, and the warnings against spinsters a hundred years ago (Hellesund 2003). The director of the Norwegian Cancer Register is among those who have spoken frequently against the lifestyle of the single urban women, where they “go to cafes late at night” and “refuse to grow up”. Their late childbearing age is portrayed as a major threat in regard to cancer (Hellesund 2003:10-11). There is no audible debate in the rise in old people living alone.

### **2.9.2. Is there any social/ public housing provision for single people?**

There is no specific social/ public housing provision for single people. During the post-war decades a shortage of housing was a big societal problem. All public policy was set out to help families get housing (through public housing, through, housing cooperatives and cheap loans through The Norwegian State Housing Bank) and there were strict restrictions on what kind of housing singles could get. The singles-organisation Ensliges Landsforbund was founded in 1952 to speak up for the right of singles. Their main agenda was to improve housing conditions for singles. They worked to change regulations favouring families, and they also set up many housing cooperatives for singles (Brevig 1985). One of the issues the organisation currently has on their agenda is that singles should get a tax break compensating for additional expenditure caused by solo-living.

The Norwegian Christian Democratic Party (KrF) has probably been the political party raising the issue of single living most frequently. The national organisation for the rights of singles (Ensliges Landsforbund) has worked for a long time to get the government to

do a major report on single life in Norway. These kinds of reports are written about many other groups, like Families with small children (NOU 1996:13), Cohabiting couples (NOU 1999:25), Living conditions for children and youth in Norway (St. meld. Nr. 39 2001-2002), Living conditions and life quality for lesbians and gays (St. meld. Nr. 43 2000-2001), About the family – commitment to parenthood and parents living together (samliv) (St. meld. Nr. 29 2002-2003). At the same time the minister of Minister of Children and Equality launched a new panel on men and a parliament report on men in Norway (summer 2007), she cancelled the expected work on a report on single life. She argued that singles are such a diverse group that it is hard to do a report on them.

## **2.10. (Trans)gender Recognition**

### **2.10.1. What is the legal situation regarding trans people? Is there provision to register a person's "new gender", for instance, by changing birth certificates and passports? What is required (i.e. surgery?) to achieve recognition of "new gender"?**

After gender-reassignment surgery one qualifies for a judicial change of gender. That means one can get a new personal-number, and have the new gender on all official papers. An application for this is sent to Folkeregisteret/the National register, and to get a new person-number (which also indicates sex) the sex-change has to be confirmed from the hospital performing the treatment. One can also have your new gender/name backdated to appear on school credentials etc. You have to go directly to former employers etc to ask them to change the old data.

### **2.10.2. What body/institution has the authority to deal with transgender issues?**

It is mainly the centralized unit, the GID (Gender Identity Disorder) clinic at Rikshospitalet in Oslo that deals with transgender issues. There is close contact between this unit and the interest organization for transsexuals (Folgerø and Hellesund 2009). When the GID-clinic had to close in 2000 due to budget cuts, the interest organization was founded. Together with the clinic they managed to get it reopened.

### **2.10.3. Is there anti-discrimination legislation regarding trans people?**

There is currently no specific anti-discrimination legislation towards trans people. The equality and discrimination ombud, wrote in 2005 that she considered trans people to be protected through the law on gender equality. Until then, the ombud had not received any discrimination-complaints concerning trans-persons. Norway is bound by the European convention of Human rights, a convention where trans people are covered by the § 14

(Likestillingsombudet, accessed 3 June 2005,  
[www.likestillingsombudet.no/horingsuttalelser/transkjonn2005.html](http://www.likestillingsombudet.no/horingsuttalelser/transkjonn2005.html) )

#### **2.10.4. Does the health service provide gender reassignment surgery? Is it free? How is it accessed?**

A centralized unit, the GID-clinic at Rikshospitalet, takes care of all applications in Norway. One can contact the unit at GID-clinic directly, or one can be directed there by one's personal physician. If one gets diagnosed as F64.0 – transsexualism<sup>23</sup>, the treatment is free. If one gets through the psychological evaluation, and is directed further into the process, one has to live as the preferred gender for at least one year before the operations start.

##### **Comment**

The treatment focuses primarily on genitals and sexual gonads, and many patients feel that too little attention/help is given in regard to plastic surgery of face, hair-removal etc. Penis construction is not so usual (really hard to do successfully), but considerable energy is put in to constructing vaginas (Folgerø and Hellesund 2009).

The Norwegian Christian Democratic Party, KrF, has been among the strongest opponents to lesbian and gay rights. In their political manifesto for the period 2005-2009 they strongly support the right of transsexuals (as the only political party):

”Some people are born like men, but feel like women, or the other way around. To be a trans-sexual is tabooed and is a big challenge for the individual. KrF will take the situation of these people seriously and work so they are ensured good and holistic healthcare, and for those this is right for, sex-change operations. In addition to this we must strengthen the work on better attitudes, to get rid of discrimination, and increase the tolerance for people who differ from the majority” (KrF Politisk program 2005-2009, <http://www.stem-krf.no/helsepolitikk.aspx>, accessed 23.09.2008).

<sup>23</sup> F64.0 transsexualism is a category in the international ICD-10 classification system of mental and behavioural disorders



## **2.11. Care**

### **2.11.1. Is there any policy/ public debate about care, particularly the “care deficit”?**

There is not a very potent Norwegian debate on the “care deficit”. There are however several political debates about care which mainly focus on who has the right to care, how much care should the citizens expect from the state, should care measures be run by the state or by private companies, and should it be easier for persons to get time off from work to care for family members (like parents and partners)?.

### **2.11.2. What rights, if any, do people have for (paid or unpaid) leave from work to care for children, partners, family members/ elderly parents, friends?**

In Norway, public help for private caring is mainly focused on children: parental leave when the children are born/adopted, and the right to stay home when the child is sick. Apart from this there are no universal rights connected to care leave. In the public sector employees have the right to apply for special care-leave. In the private sector it depends on the employer. Many also solve the need for care leave through sick-leave.

The labour unions as well as different political parties continue to propose different new forms of care-leave (like leave for taking care of elderly, disabled, or sick family members). So far, these proposals have not reached the laws.

- **Sick children**

When a child (or the child-caretaker) is sick the parents have the right to take time off from work (and still get paid). In general this right is in force until the child is 12 years old, but if the child is handicapped or chronically ill, the age is 18 years old. In two-parents families the rules are:

Up to 10 days for each of the parents with 1-2 children.

Up to 15 days for each of the parents with more than two children.

Up to 20 days for each of the parents if they have a chronically ill/handicapped child.

A single parent can double the above.

If a child has to be institutionalized (e.g. in hospital) special rules apply.

- **Breast-feeding breaks**

Women who nurse their child can take paid time off from work (thirty minutes two times a day), or they can demand one hour reduced work-time each day (Law on Work Environment § 33).

#### **Comment**

Breastfeeding is widespread in Norway. Ammehjelpen (established in 1968, a breastfeeding-organisation that was a part of the new women's movement) still plays an important role. Since most mothers go back to work after 12 months leave, this is considered the normal time to stop breast-feeding in Norway. The Directorate for Health and Social Affairs recommends only breast-feeding for the first 6 months, and then other food combined with nursing until 12 months. A mother with an infant and a bottle of milk is very much taboo in Norway. Occasionally - also in the summer of 2007 - a newspaper debate on this issue appears in the national newspapers. Several people spoke up about the pressure to breastfeed. A gender-researcher started the debate, and several others were also active in the debate.

<http://www.forskning.no/Artikler/2007/juli/1184142484.86> (accessed 23.09.2008)

<http://www.adressa.no/nyheter/innenriks/article895376.ece> (accessed 23.09.2008)

<http://www1.vg.no/helse/artikkel.php?artid=150927> (accessed 23.09.2008)

## ***2.12. Tissue and Organ Donation***

### **2.12.1. Are there restrictions on who can donate bodily tissue and organs to whom? (i.e. family members)**

Organ donation is regulated by Law on Transplantation, Autopsy and Submittance of Bodies (LOV-1973-02-09-6). Live donors have to give written consent, and as long as they are over 18 years old the law does not set any restrictions on who can donate to whom. In special circumstances donors between 12 and 18 will also be allowed to consent to donation (with consent from parents/guardians). If the donor is under 12 years, there are limitations on who they can donate to. The law states that persons under 12 years only can donate to siblings, parents or in special cases other close relatives (LOV-1973-02-09-6, §1). In cases of a dead donor, the hospital must follow the request of the deceased if this is known to them. If a specific request does not exist, the hospital can use organs and other biological material to treat other patients, unless the deceased or his/her next of kin have spoken explicitly against it, or if there are reasons (like religious) that they would oppose it. If possible, the next of kin should be informed about the death before the procedure takes place (LOV-1973-02-09-6, §2).

### 2.13. Conclusion and comments

Sociologist Sevil Sumer argues that Norway is a country of individualised family policy. She defines it as a defamilialized welfare state since most benefits are formulated without reference to family status (Sumer 2004). On one hand it can be argued that the nuclear family is still strong in Norway, but that the definition of “nuclear family” has been widely broadened. Neither marriage nor heterosexuality is a necessary condition in many policy contexts. Nor are biological bonds necessary for constituting a parent-child relationship. Although policies supporting single parenthood are quite strong, it is also clear that partners in a romantic relationship are seen as one of the foundations for “family”. These partners are assumed to be living together. It seems like children also are seen as a preferable ingredient in a “family”. Families with children have been the main target for supportive state policies. The Statistics of Norway defines a family as “persons with permanent residence in the same house, tied to each other as spouses, cohabitants or registered partners, and/or as parents and unmarried children (regardless of the age of the unmarried child). A family can at the most consist of two (following) generations and only one couple who is married/cohabitating/or in registered partnership. We also count single persons as family, so that all persons are part of one household (hushold) and one family, either together with other persons or alone (Hauge, Hendriks, Hokstad and Hustoft 2000). However, the historians behind the book *I gode og vonde dager*, are probably right when they argue that the Norwegian understanding of family that “most of us have, is that family is the same as the nuclear family: father, mother and child/ren” (Sogner 2003:14). Although these well-known family historians thus support a quite narrow common-sense understanding of family, the official policy documents usually have a much wider and more democratic definition.

At the same time this wide and democratic definition of “family” gets competition from another discourse: the increased focus on biology. In some policy-areas biological bonds are highly stressed, particularly in the policy-areas concerning fatherhood, national adoption and assisted fertilization. While the rights and recognition of biological fathers

has been stressed in regard to existing children, anonymous sperm is now prohibited to use in assisted fertilization because “every child now has the right to know its biological father”. On the other hand, the law states that the mother of a child is the one giving birth to it, thus making surrogacy legally impossible. It is prohibited to donate eggs in Norway. There is virtually no national adoption in Norway, also because a child’s bonds to biological parents are seen as unbreakable. Fostercare is the action taken if a child cannot live with its parents.

Adults not living in “romantic” relationships and not having children are invisible in the field of intimate citizenship policy. I would argue that this also reflects a major ideological marginalization of this group. The field of public focus and policy on intimacy in Norway marginalizes all intimacies which fall outside the “couple” (two partners) or “parent-child” relation.

The area of Intimate Citizenship seems to be one of the main areas where “they” differ from “us” in a negative way. Facing an increasingly multicultural population, the government seems to feel an increased need to stress not only the actual Norwegian policy, but also to highlight the values behind it. On the “Welcome to Norway” webpage, meant as information for foreigners in Norway and launched by Norwegian directorate of immigration, you can read interesting presentations of Norwegian intimate policy. Under the category “Family and children” the first four headlines are: “Many kinds of families”, “Forced marriage”, “Separation and divorce” and “Domestic violence”. We can assume that the Directorate of Immigration sees it as particularly necessary to educate immigrants in these areas. While forced marriages and Domestic violence is portrayed as highly conflicting with “Norwegian values”, “Many kinds of families” and the right to an easy divorce “if you no longer wish to live with your spouse”, are described as crucial Norwegian values.

[http://www.nyinorge.no/modules/module\\_123/proxy.asp?C=30&D=1&I=0](http://www.nyinorge.no/modules/module_123/proxy.asp?C=30&D=1&I=0) [accessed 23.09.2008]

## **2.14. Norway Appendices**

### **2.14.1. The fight for the Marriage Act**

#### **Readers letter, 5 March 2007:**

“The proposal for a gender-neutral law of marriage is soon to be decided in parliament. This is a sensational proposal which mainly is about removing the first of the four criteria which today have to be fulfilled for a marriage to be valid. Those four criteria are the gender criteria (one of each gender), the criteria of number (only two persons), criteria of age (over 18, 16 years with consent) and the criteria of family (not too close family related). When there is now a proposal to abolish the first of these criteria, what arguments does one have to keep the three others? Proposals to abolish the criteria of number are already suggested. Is this really a development we want? I believe our society in no way will benefit from a change in the law of marriage, and I will argue that it is possible to attend to sexual minorities in other ways. If you want to protest against the proposal, you can do it on the website MorFarBarn (MotherFatherChild).”

Eli and Roald Fuglestad (BT 5 March 2007) [BT is the main newspaper for Bergen, the second largest city in Norway]

### **2.14.2. Adoption of children among lesbian couples**

During summer 2002, the Norwegian author, ex-minister of justice, and celebrity Anne Holt, and her pregnant female partner, Tine Kjær, received headline coverage when they attempted to focus on stepchild adoption. Homosexuality has taken up a lot public space in the decades around the millennium, either focusing on specific issues (registered partnership, gay and lesbian clergy, adoption, gender neutral marriage law), or on individual celebrities/public persons and their actions and preferences. During a couple of weeks in autumn 2002, approximately 25 000 comments were sent in by e-mail to one of the major newspapers to comments on the debate concerning Anne Holt and Tine Kjær, The public debate around this, and Anne Holt’s and her partner’s Tine Kjær’s voices in

this debate are interesting in regard to the Norwegian understanding of the nuclear family. Anne Holt said in an interview:

“I think that every child should have a father. The optimal context for a child is to be conceived and born by a man and a woman who love each other now and forever (...) I have always been concerned about the role of the father, and see the father as very important for a child. But I see that Tine and I have ways of compensating for this; after all, the most important thing is that we are two parents.” (ref. (Dagbladet 05.07.2002))

Here, Anne Holt argued that every child should have a mother and a father, and it seems that this stems from the importance of being conceived and brought up by a mother and a father. Furthermore, she promotes the ideology that lifelong monogamy for those who have children is preferable to other kind of relationships, and that these long-lasting relationships should be based on romantic love. She also states that it is best for children to have two parents. In a study of the Norwegian same-sex adoption debate (Anderssen and Hellesund - forthcoming), the views represented in this quotation were prevalent and were presented as universal and ahistorical norms. Even participants who emphasized today's pluralistic family patterns in Norway provided no critique of such basic views.

## **2.15. Norwegian concepts of intimate citizenship**

The following are some of the important terms used to describe intimate relationships in Norwegian. Some of them differ substantially from the way the English language constitutes intimacy and intimate categories. The language used around intimate citizenship is constantly changing to keep up with the changing cultural frames in the area.

### **Samboer = cohabitant**

It is used both to describe civil status “I am samboer” and to describe the significant other “This is my samboer”. The term is genderless. The term has been widely used since the 1990s. Back in the 1970s terms like “paperless marriage”, “cohabiting relationship” or “unmarried “samliv”” were the most common terms (NOU 25:1999). In the 1900 the term for cohabitation was concubinage.

### **Kone = wife**

“My kone works as a nurse”

### **Mann = husband**

(Directly translated: man) - “this is my mann”

### **Kjæreste = “dearest”**

Used to describe a girlfriend/boyfriend; a partner. (Kjæresten works as a nurse). Usually about a partner with whom one does not live, but also used about a wife/husband or a cohabitant to underline the romantic nature of the relationship. The term is genderless.

### **Partner = partner**

This term has become more frequent in recent years to describe a “partner” in a romantic relationship, but is still not very widespread. For many, the term feels too much like a “business partner”. Partner is the official term to describe a same-sex registered partner-couple. Some of these couples use the term “partner”, other uses “wife” or “husband”.

### **Samliv = “life together”**

Describing the life of a couple together. “Their samliv was very happy”. In official statistics “Not in samliv” is describing people not living together with a partner (in marriage or cohabitation). It is gender neutral and is used for both heterosexuals and homosexuals. It is a much used term in official documents concerning intimate citizenship.

### **Sivilstand = civil status/”marital status”**

In contrast to “marital status”, the concept “sivilstand” is neutral in regard to marriage. Sivilstand describe if you are single, divorced, widowed, partnered or married, without mixing marriage into the term.



**Samlivsbrudd= breakup of a samliv/of partners living together**

The concept is more and more replacing the concept “divorce” (skilsmisse), to underline that all breakups between partners are taken into account, not only the married ones. The term is genderless and as such applies to both heterosexual and homosexual break-ups. It’s the political correct term used in most official context etc, and also used to describe this kind of events in own lives.

**Ste = step**

The prefix “step” is vanishing rapidly. Instead one uses “this is my samboers son”, “this is my wife’s son”. Depending on the family-situation one might also use just “son”, but if the son’s biological mother is still around, it might feel safer to specify “my husbands son”. “Step” is probably mostly used between siblings, about kids living together like siblings without necessary being blood-related. Some children also use step- to describe a parent, but most adults are reluctant to name a child “step”. After a brief “survey” among my colleagues, they confirm that this is a sensitive issue within the families, and that despite the huge number of families living with “different forms of children”, a satisfying vocabulary has not yet been developed.

**Hushold = household**

The word used in official documents to describe how the population live. A hushold is the person/s living in a residence. It can be one person, a nuclear family, siblings, whatever. It is not used in everyday language to describe real life.

**Homofil =”lesbian/gay”**

In 1951, the lesbian/gay organisation DNF’48 published the first Norwegian pamphlet about homosexuality. Here they also introduced the concept homofil, a concept with roots in the liberation movements of the 1940s and 1950s. Norway is probably the only country still using this as the central concept for same-sex sexuality (Jordåen 2003:91).

According to the dictionary Riksmålsordboken the word homofil was created from latin homos = same, and philein= to love. Also according to the dictionary Riksmålsordboken it was first used in a Norwegian newspaper in 1965 (Mgbl. 1965/14/10/2). DNF’48 wanted this word to replace the term “homosexual”, to get rid of the negative sexual connotations of the latter. Homofil is the most common and - apart from in (academic) queer circles- also the most politically correct term for same-sex lovers in contemporary Norway.

**Heterofil = heterosexual**

The main word for heterosexuals.

**Homse = a popular term for a gay man****Lesbisk = lesbian****Lesbe = a popular term for a lesbian****Hetero = a popular term for a heterosexual**

**Legning = inborn disposition**

The term is almost universally used in Norway, despite its signalling of traditional essentialist views on homosexuality. It is frequently used in the public debates concerning homosexuality. It was probably introduced by homophile activists to replace the view of homosexuality as a diagnosis. I hear “legning” as more fixed than the English word “orientation”. Orientation still opens more up for some “movement” being possible. In the antidiscrimination paragraph 135 in the criminal law it is specified that it is illegal to discriminate on the basis of: homofil legning, lifeform (leveform) or orientation (orientering). “Legning” might be equivalent to “sexual identity” if this is understood in an essentialist way.

**Transseksuell = transsexual****Transkjønnet = “transgender”, but read explanation!**

Until 2005, the main organization for trans-people was named *The National organization for transsexuals*. At their annual meeting in 2005, they decided to change the name to *The National Organization for Transgendered People*. On the phone (June 5<sup>th</sup> 2007), the leader and founder, Tone Maria Hansen, explains this as a wish to move away from a highly stigmatized and sexualized image, and to underline that being transgendered is about gender-identity, not about sexuality.

**Transe = transperson**

A popular term for transsexuals, transgendered, transvestites, anything trans

**Skeiv = queer**

Terms adapted from English and meaning more or less queer. My impression is that the Norwegian version is even more oriented towards the hetero-homo binary than the English term, and as such “skeiv” often comes to mean “homo”.

**Streit = straight**

Term adapted from English, and meaning more or less straight. It is used both to describe heterosexual inclinations and to describe conventionality/people acting within the norms. It can be stretched to describe someone boring/unadventurous.

**Kjønn = sex and gender**

Sex and gender are not separated in the Norwegian language. It is sometimes used for sex and sometimes for gender, and the term is pleasantly ambiguous and unclear.

**Likestilling = equality**

In the Norwegian context the word likestilling/equality has come to refer primarily to **gender equality**, or more specifically that women should be equal/have equal rights with men. In the last decade this understanding has been combated, primarily from a men’s rights perspective.

### 3. Portugal

Ana Cristina Santos

#### 3.1. *Marriage*

##### 3.1.1. What is the legal definition of marriage? Does the constitution define marriage/ grant it a particular role?

Marriage is defined by Family Law, one of the sections included in the Civil Code (1967, revised in 1978). According to this law, marriage is a “contract between two different-sex people who wish to start a family in a full sharing of life” (article 1577). The same legal code also states that marriage is either Catholic or civil (article 1586) and that there cannot legally exist a marriage between same-sex persons (article 1628). Marriage is one of the four sources of family juridical relationships, alongside kinship, affinity<sup>24</sup> and adoption.

Family Law also establishes that marriage is “based on equal rights and duties of the spouses” and that the “command of the family belongs to both spouses who should find an agreement regarding the course of the life in common bearing in mind family wellbeing as well as each other’s interests” (article 1671 of the Civil Code, dating from 1978).

The Constitution, written in 1976, attributes importance to marriage. Under article 36 it establishes the main principles regarding family and marriage, namely 1) that every person has the equal right to start a family and get married; 2) that it is the law what will regulate the criteria and effects of marriage and its dissolution; 3) that spouses have equal rights in terms of their political and civil power and their children’s education; 4) that children born out of wedlock cannot be discriminated against; 5) that parents have the right and the duty to educate and raise their children; 6) that children cannot be removed from their parents unless they fail in the duties as parents and there is a court decision

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<sup>24</sup> Affinity is the link that connects each spouse to the other spouse’s relatives (definition dating back to law-decree n. 496/77, of 25 November).

determining otherwise; and 7) that adoption is regulated and protected under the law and should be a quick procedure.

There are five duties associated with marriage to which both spouses are bound: respect, fidelity, cohabitation, cooperation and care/support (article 1672 of the Civil Code; these 5 duties were also established in 1978, but some of them already existed prior to that, such as cohabitation). Sexual contact between spouses is regarded as a marital duty in many law texts books, under the duties of fidelity and cohabitation. Cohabitation is interpreted as “sharing bed, table and house” (Pinheiro, 2004: 73)<sup>25</sup>, i.e. not only sharing the same house but also the same bed, and having sexual intercourse – what is known in law books as the “spousal debit” (Ferreira-Pinto, 2004: 131-132). Some law experts argue that this spousal debit is “the supreme sexual duty” (Varela, 1999: 345) and “the most natural and immediate duty among those that result from marriage” (Pais de Amaral, 1997: 82).

In Canon Law, the lack of sexual consummation between spouses is regarded as ground to render a marriage null (canon n. 1142) and impotence is an impeding factor for marriage (canon n. 1084).

### **Comment**

This definition of marriage is clearly heteronormative and reveals the close ties between law and the Catholic Church. In fact, if that was not the case, rather than saying marriage is Catholic or civil, it should say religious or civil. However, regardless what is in the Family Law, in June 2007 the minister of Justice announced the recognition of religious marriages would from that moment include weddings celebrated by any religion which has been registered in the country for over 30 years or registered in another country for over 60 years. This expansion of the Catholic privilege to other religions was included in the revision of the Civil Registration Code.<sup>26</sup>

<sup>25</sup> Court decision n. 070860, STJ, dating from 25/05/1983, among others, also point in that direction. Available at <http://www.dgsi.pt> [accessed 28/07/2008].

<sup>26</sup> Available at <http://www.correiomanha.pt/noticiaImprimir.asp?idCanal=10&id=248286> [accessed 19/06/2008].

**Comment**

Among the duties of spouses are fidelity and cohabitation. This has implications for the way non-monogamous and LAT relationships are perceived and experienced, as multiple sexual partners and separate houses could be considered as violating marital duties.

Cohabitation in fact is so important that it already existed, as a marital duty, in 1910, decree n. 1, article 38, n. 2, which determined that the spouses were obliged to live together. There are legal impositions regarding the identification of one family home, namely regarding taxes and divorce. As Pinheiro explains, “it is expected that spouses will normally live in one place, the family residence or family home” (Pinheiro, 2004: 277).

In relation to fidelity, adultery is the silenced word which is still present in the way law text books frame fidelity. In fact, adultery used to be identified as a ground for divorce in the 1967 Civil Code (articles 1778 and 1792), and it was removed from the Civil Code only in 1975. However, adultery is still mentioned twice in the Civil Code. First, the fidelity duty still applies until the moment the marriage is declared as dissolved, i.e. even when spouses are legally separated (but not divorced yet) the fidelity duty is still in place and adultery is mentioned in the Civil Code as a reason to ignore the 2-years waiting period between judicial separation and divorce (article 1795-D, n. 3, Civil Code). Second, concerning inheritance, any disposition in a will is considered null which would favour the person with whom the deceased married person committed adultery (article 2196 of the Civil Code), and the same applies to donations (article 953 of the Civil Code).<sup>27</sup>

**Comment**

In 2004 there was a court decision by the Supreme Court of Justice in which the lack of sexual intercourse between spouses was considered a ground for reducing the prison sentence previously given to a husband who had killed his wife (from 20 to 16 years prison sentence). The judges reported that the fact that the victim had refused to have sex

<sup>27</sup> This topic is developed in Coelho & Oliveira, 2008: 74.

with her husband meant that she had also violated the marital duties. (*Diário de Notícias*, 01/07/2004).

### 3.1.2. At what age can people get married? What obstacles are there to marriage?

Family Law establishes 16 years old as the minimum age for marriage (article 1601 of the Civil Code).

There are three categories of impediments to marriage –absolute impediments, relative impediments and temporary impediments.<sup>28</sup>

Absolute impediments (article 1601 Civil Code, dating back to law-decree n. 496/77, 25 November):

- Younger than 16 years old
- Dementia or inability due to psychic anomaly
- Previous non dissolved marriage, either catholic or civil.

Relative impediments (article 1602 Civil Code, dating back to law-decree n. 496/77, 25 November):

- Kinship in direct line
- Kinship in collateral line up to second degree
- Affinity in direct line
- The previous sentence of one of the parties, as author or accessory of homicide (achieved or attempted) against the other party's spouse.

Temporary impediments (article 1604 Civil Code, dating back to law-decree n. 163/95, 13 July):

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<sup>28</sup> In Portuguese the categories identified are *impedimentos dirimentes absolutos*, *impedimentos dirimentes relativos* and *impedimentos impeditivos*.

- The absence of authorisation from the parents or guardian of the minor who is getting married
- The inter-nuptial break
- Kinship in collateral line up to third degree
- Relation of guardianship or legal administration of assets
- Relation of ‘restrict adoption’
- Accusation of one of the parties, as author or accessory of homicide (achieved or attempted) against the other party’s spouse, until he/she is not considered not guilty

### **Comment**

The Civil Code establishes what is called an inter-nuptial break (article 1605). This is to define that there has to be a certain amount of time between the date when a former marriage is dissolved, or declared null, and the next marriage. The most surprising aspect of this, however, is that the period of time varies according to gender: men must wait 180 days, whereas women must wait 300 days. There are exceptions, whereby a woman can re-marry after 180 days: when she gets a judicial statement certifying she is not married and that she had no children after the marriage was dissolved; or if the former husband died or if they were already judicially separated.

This law was implemented in order to protect property losses before paternity tests were widely available. Still, its underpinnings suggest also the ‘protection’ of the next husband from being misled by an already pregnant woman. This interpretation is shared by some law experts who emphasise the moral intentions of the law-maker when they say that the inter-nuptial break aimed at “avoiding, because of obvious scrupulous caution in relation to morality, that the women would get married for the second time while she was still pregnant by her first husband” (Coelho & Oliveira, 2008: 269). These same authors also state that the inter-nuptial break came about with a double intention: 1) to impose a *tempus lugendi*, i.e. a period when moral/social conventions would be respected regarding shifting spouses; and 2) to avoid *turbatio sanguinis*, i.e., that the child born

before those 300 days would be confronted with the fact that her/his father was legally both her/his mother's previous husband (when the child had been conceived) and her/his mother's current husband (when the child was born), as it is determined in article 1826 of the Civil Code concerning the presumption of paternity (see section 6.3.).

Another interpretation, provided by a lawyer working in the Commission for Citizenship and Gender Equality, is that this law exists because there is sexism in the law. This seems to be the case, particularly when one considers what is the legal consequence of disregarding the inter-nuptial break – “the person who gets married again without respecting the inter-nuptial break will lose all assets that s/he had received by donation or will from her/his former spouse” (article 1650 of the Civil Code). This is a clear example of how marriage, children and property remain interlinked.

### 3.1.3. Civil versus religious marriage? Where and how do people get married?

According to the Census 2001, 49.6% of people living in Portugal are married with registration, whereas 3.7% are married without registration.

The percentage of Catholic marriages, compared to the overall number of weddings, has been steadily decreasing since the 1960s<sup>29</sup>:

Year	1960	1970	1981	1991	2001	2005
<b>Catholic weddings</b> (% total weddings)	90.7	86.6	74.0	72.0	63.0	57.02

It was only in 2007 that the state granted equal status to religious non-Catholic weddings (provided that the religion has been formally established in the country for over 30 years or for 60 years in another country).

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<sup>29</sup> Sources: Almeida *et al*, 1998; INE Statistical Information.



### **3.1.4. What are the fiscal benefits and privileges of marriage – e.g. tax (is there a married couples' tax allowance?), social security and unemployment benefits, pensions and survivors benefits, carers' allowances, inheritance rights?**

The tendency in the law is to grant equivalence between marriage and de facto unions in these regards, with cohabitation being framed as “situation similar to married spouses” and the cohabiting partner being referred to as “person in a de facto union”. For instance, the survivor’s benefit applies equally to marriage and de facto unions.

In terms of fiscal benefits, there are no benefits attached to being married.<sup>30</sup> There used to be a marriage benefit (article 11 of Decree 170/80), which established an amount to be paid to each one of the working parties when they got married. This marriage benefit was abolished in 1997 (Decree 133-B/97, 30 May), being replaced by an increasing support of parents.

There are two situations in which unmarried and single parents get more tax relief than married couples. First, unmarried or divorced people can deduct up to 60% of the minimum wage in their tax, whereas married people can only deduct 50%. Single parents can deduct 80%. Second, divorced or single parents get more tax relief based on educational expenses of their children (up to 6500€ per child) than married couples with children do. This is highly contested by pro-family organisations in the country which have started a petition to demand what they see as discrimination against married people.<sup>31</sup>

In case of death, according to the Civil Code (articles 2132 and 2133, dating from 1978), legitimate heirs are the spouse, relatives and the state in the following order of preference:

- a) spouse and descendents
- b) spouse and ancestors

<sup>30</sup> This information was also provided by the Tax Information hotline in Portugal, 08/11/2007.

<sup>31</sup> Petition available at <http://www.forumdafamilia.com/peticao/>. [accessed 06/09/2007].

- c) brothers [sic] and descendents
- d) other collateral relatives up to 4<sup>th</sup> degree
- e) the state

The surviving spouse is entitled to half of all assets (according to the regime of assets that applies – please refer to section 1.10). The other half is divided equally between the descendents and the spouse. The surviving spouse takes precedence over other heirs concerning the family house and assets within it, except when that exceeds the total amount he/she was entitled (article 2103 Civil Code).

**3.1.5. What are the social benefits and privileges of marriage – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals etc?**

In the juridical regime of holidays, absences and leaves, a public servant may enjoy up to 11 days absence when s/he gets married (article 22, Decree N. 100/99). According to the Labour Code, approved in 2003, each worker is entitled to 15 days off work when s/he gets married (article 225). This possibility of absence is not included in the de facto union law, which therefore constitutes a benefit to heterosexual couples exclusively.

The Labour Code also establishes that the worker can be absent from work up to 5 days in case his/her spouse, partner or 1<sup>st</sup> degree in direct line relative dies.

The right to support on a permanent basis in case of illness granted to spouses is not included in the de facto union law. Therefore, it is up to the hospital to read the law in a broader sense and grant equal status to spouses and partners, or not. However, the Health National Service Guidelines (*guia do utente*), when referring to disabled people, does indicate that partners should be considered equivalent to spouses (it states that any disabled person is entitled the right to family support by his/her son/daughter, father/mother, spouse or the equivalent).<sup>32</sup>

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<sup>32</sup> Info available at <http://www.dgs.pt/> [accessed 10/07/2008].

Concerning social housing, the absence of objective criteria was the main finding. After contacting the National Institute of Housing about the criteria for allocation of social housing, the information provided was that there were no established criteria, because it was the responsibility of each City Council to determine these criteria.<sup>33</sup>

The general understanding among researchers is that the main criterion is income, rather than family arrangements. However, there is also considerable subjective power on the part of the social worker who will evaluate each case.

In one case (Municipality of Setúbal), the City Council website<sup>34</sup> mentioned a file on Families in Need of Housing, and it identified the following typology:

- Elderly families, pensioners or retired people living in old and damaged houses, particularly in the historic centre
- Families living in patios<sup>35</sup>, in places lacking the most basic conditions
- People of working age, but excluded from the labour market or doing informal work
- Lone-parent families
- Victims of domestic violence
- Recently constituted families, many of which coming from social housing neighbourhoods
- Units (*agregados*) with low income
- Immigrant families, particularly those originally from countries with Portuguese as official language

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<sup>33</sup> Information provided by Helena Quartin, personal communication 11/02/2008. After contacting 4 major city councils in February 2008, one of them answered, informing that it was up to a specific company, created by the Council in 2000, to determine. This company was also contacted but no answer was ever provided. A second city council answered later on, providing thorough information and examples.

<sup>34</sup> Info available at <http://www.mun-setubal.pt/principal.asp> [accessed 20/01/2008].

<sup>35</sup> Type of shared community housing arrangements, such as camps.

Information provided by one city council mentioned that what was important was a cluster of criteria, rather than one winning requisite: being on the waiting list for a long time, being poor, having serious health problems or disability, were the examples provided. The same source added that the marital status of the applicant had no relevance concerning the council's decision and that the notion of unit (*agregado*) they used was wide enough to include solo living as well.<sup>36</sup>

### **Comment**

The juridical regime of holidays, absences and leave for public officials was established for the first time in 1988 (law-decree n. 497/88, 30<sup>th</sup> December<sup>37</sup>). It aimed at gathering in one document several laws dealing with the topic and that were widely dispersed. In this law it was established that spouses working in the same service/institution would have priority when scheduling their holidays, so that their period of holidays would coincide. It also established that this possibility would also apply to “people living for more than 2 years in circumstances analogous to spouses”. Likewise, for absence in case of death, it also mentions “person living in circumstances analogous to spouses”. It should be noted that this was 12 years before any law on cohabitation (*de facto* union) was approved. However, there was one case in which this law privileged married people over cohabiting partners, which had to do with the marriage leave – spouses were entitled to a 10 days leave, including the day of the wedding. There was no equivalent in the law for cohabiting partners.

Law n. 3/93, 5<sup>th</sup> April established new rules concerning holidays, absences and leave for public officials, namely priority for spouses or *de facto* partners working in the same service/institution to schedule their holidays on the same period of time or justified 6 days absence in case of death of spouse, partner or relative in direct line 1<sup>st</sup> degree.<sup>38</sup> Despite this progressive law, its actual use is not widespread, mostly because most couples do not work together in the same service/institution. Moreover, the law also

<sup>36</sup> Information provided by Luis Marvão, personal contact, 02/02/2008.

<sup>37</sup> Available at [http://www.isa.utl.pt/files/pub/direitos/497\\_88.pdf](http://www.isa.utl.pt/files/pub/direitos/497_88.pdf) [accessed 12/02/2008].

<sup>38</sup> Available at [http://www.minedu.cv/index.php?option=com\\_docman&task=doc\\_view&gid=45](http://www.minedu.cv/index.php?option=com_docman&task=doc_view&gid=45). [accessed 19/02/2008].

establishes that it is the employer who decides if employees' requests concerning holidays are in the best interest of the service/institution or not, and therefore the employer has the power to ignore this law to a certain extent.

### 3.1.6. Is rape in marriage a crime?

The current definition of rape does not specify the marital status of the victim or the aggressor, and so marriage would not be a condition for excuse. The crime of rape is defined in the Penal Code as “anyone, through the use of violence or serious threat, making the other person unable to resist, who force the other person to have sex, anal sex or oral sex, either with his/herself or with someone else, will be punished from 3 to 10 years prison” (article 164).

Until 1982, rape in marriage was not a crime because sexual intercourse between spouses was always considered legitimate, even if it was against the will of one of the spouses.<sup>39</sup>

In 2004 the Portuguese Association in Support of Victims (APAV) received 165 complaints of marital rape and 120 concerning sexual abuse between spouses. In 2005, these figures decreased slightly: 162 and 105, respectively.<sup>40</sup>

#### Comment

An interesting aspect concerning the legal definition and framework of rape is its gender-bias or gender-neutrality (i.e. whether the victims of rape must be women and the aggressors must be men, on the eyes of the law). According to the Penal Code of 1886, the aggressor was the person that “through seduction, abused<sup>41</sup> a virgin woman, older than 12 and younger than 18” (article 392). This was the case with the highest numbers of convictions in Portugal – 391 in 1953 (according to *Estatística Judiciária* 1953). The Penal Code of 1896, that was used until 1982, also established that, in case of rape of a

<sup>39</sup> Available at [http://www.cite.gov.pt/Formar\\_Iguald/PDFs\\_Manual/M04\\_01\\_Capitulo\\_II\\_01.pdf](http://www.cite.gov.pt/Formar_Iguald/PDFs_Manual/M04_01_Capitulo_II_01.pdf). [accessed 17/06/2008].

<sup>40</sup> Amnesty International, no date.

<sup>41</sup> In Portuguese the term used is “estupro”, as opposed to rape.

virgin woman, the offender would have to repay (through *dote*, a financial compensation) the offended, even if he was to marry her. In case of marriage, the prison sentence would be suspended for a period of 5 years. The prison sentence would be applied though in case there would be a divorce during that period of 5 years (article 400). In the Portuguese Penal Code of 1982, women were considered as the only possible victims of rape. Furthermore, non-consensual anal or oral sex was not considered rape (articles 201 and 202). In 1995, article 164 of the Portuguese Penal Code expanded the sentence due to rape to a minimum of 3 to 10 years, and considered non-consensual anal intercourse as rape. Finally, in 1998 (Law N. 65/98, 2 September), oral sex was also included and any reference that made the woman the only possible victim was eliminated. So, since 1995 the Portuguese law considers as a potential rape victim any person, regardless of gender, obliged to have vaginal, anal or oral sex without his/her consent.

### Comment

Court sentences in case of rape are also relevant sources when examining gendered notions of aggressor and victim. For example, in a rape court case on 18 October 1989 in Portugal, the judge stated that the victims, the Yugoslavian Svetlana and Dubrova, should also be rendered accountable for being raped because they were two foreign women asking for a lift in the “county of the Iberian male”:

“However repulsive these crimes may be and with no justification, the truth is that, in this particular case, the two victims contributed to a high extent for that crime. The two victims, young girls, but already women, did not hesitate in coming to the road hitchhiking, in the middle of the county of the so called Iberian ‘macho man’. It is impossible that they did not foresee the risk they were taking; here, like in their home country, the attraction for the opposite sex is an undisputable fact and, sometimes, it is not easy to contain it. So, by entering into a car precisely with two boys, they did it, we believe, aware of the danger involved, specially because they were in a tourist region of international reputation, where foreign tourist women abound, usually with a sexual behaviour which is much more liberal and relaxed than that of the majority of native women”.<sup>42</sup>

<sup>42</sup> As published in the Bulletin of the Justice Ministry, n. 390, November 1989, as well as in the newspaper *Correio da Manhã*, 24/01/2003 and 01/07/2004.

**Comment**

More than 99% of people arrested for rape are male. In 2006, there were 174 imprisoned men accused of rape (2.2% of the overall male imprisoned population) and 1 woman (0.2% of the overall female imprisoned population).<sup>43</sup>

### **3.1.7. What is the law (if any) regarding domestic violence, and what policy initiatives are there to combat it?**

Domestic violence is one of the most visible issues put forward by women's organisations in Portugal and it is also the one which has received more attention on the part of political parties and different governments. After 2000 domestic violence is considered a 'public crime' which means it can be reported by anyone, regardless of the victim presenting charges against the aggressor or not. The crime is punishable up to 5 years in prison, and applies both to married and cohabiting partners.

A revised Penal Code coming into force in 1983 was the first piece of national legislation including the crime of offences between spouses (Decree n. 400/82, 23 September). In 1991 Parliament approved a law granting protection to women victims of domestic violence (Law N. 61/91 AR, published in DR n. 185, 13/08/1991). With the exception of very few legal documents, exclusively dealing with "victims of violent crimes", the subject of domestic violence returned to Portuguese laws in 1999, when the law guaranteeing protection to the victims of domestic violence was passed (AR Resolution n. 31/99), the National Plan against Domestic Violence approved (Council of Ministers Resolution n. 55/99) and the national public network of shelters for women victims of domestic violence created (AR Law N. 107/99).

As mentioned, the legal framing of domestic violence changed in 2000<sup>44</sup> in order to frame it as a public crime, that is, one which can be reported by anyone, with no need for

<sup>43</sup> Full statistical data, by gender, age group, education status and nationality available at [http://www.dgsp.mj.pt/paginas/documentos/relatorio\\_estatistico2006.pdf](http://www.dgsp.mj.pt/paginas/documentos/relatorio_estatistico2006.pdf) [accessed 08/06/2008].

<sup>44</sup> Resolution of the Parliament n. 7/2000, published in the *Diário da República*, No. 21, 1<sup>st</sup> Series-A, 26 January 2000.

the victim to press charges before an investigation takes place. Moreover, the status of public crime requires that the investigation, once initiated, proceeds with no chance of retrieval based on the desire of the victim to forgive her aggressor. In the past the possibility of retrieving charges would stop the process, leading to several women being killed by the aggressors they tried to protect. That was the case of Maria Fernanda, 58 years old and mother of 5 children, who was regularly beaten by her husband for 20 years. Despite the incidents of aggression, which were visible in her body for days, and more than ten complaints put forward by the neighbours, when the police arrived Maria Fernanda would always protect her husband, denying what had been happening. In August 2005, she was beaten to death with a broomstick.<sup>45</sup>

There is a growing public investment in shelters for battered women. In 1995 there were 9 shelters for women victims of domestic violence; in 2001 that number rose to 35, 12 of which include professionals specifically trained to deal with domestic violence and sheltering 2632 users.

In January 2005 the Government created the Commission against Domestic Violence<sup>46</sup>, an organisation linked to the Council of Ministers, responsible for implementing and monitoring the National Plan against Domestic Violence. Among other tasks, this organisation aimed at training police officers to deal with domestic violence and to support research about violence against women.

In 2007 the Council of Ministers approved the application of the 3<sup>rd</sup> National Plan Against Domestic Violence (Council of Ministers Resolution n. 51/2007, published in DR n. 62, 28/03/2007), which consists of a plan to set in motion an array of measures to prevent and stop domestic violence, bringing together women's organisations and the government and including media campaigns, seminars, production of specific informational materials (targeting schools, hospitals, judges, city councils, etc.), training, research and support to women. There is wide public acknowledgment of domestic

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<sup>45</sup> This case was reported in detail in the newspaper *Correio da Manhã*, 10/08/2005.

<sup>46</sup> In Portuguese: *Estrutura de Missão Contra a Violência Doméstica*.



violence as a crime that must stop. Such awareness is mirrored in the increasing debates, movies or soap-operas which deal with the topic, as well as the regular celebration of the 25<sup>th</sup> November – International Day for the Elimination of Violence against Women – in recent years.

#### **Comment**

There are many cases of women being beaten or even killed by former or present partners / husbands. According to the Observatory of Murdered Women, set up by the feminist organisation UMAR in late 2003, there were 117 women killed by husbands/partners or family members between 2004 and 2006. In 56% of cases the aggressor was their present husband, partner or boyfriend. Compared to Spain, in Portugal it is 2.9 times more likely for women to be killed by men with whom they had/have an intimate relationship.<sup>47</sup>

In the first six months of 2006, the police registered a daily average of 50 complaints of domestic violence in Portugal. In average, 6 women are reported to have been beaten every week and 5 women die every month as a result of domestic violence. The Portuguese Association for Victim Support (APAV) states that 59.7% of the murderers in 2005 were the victims' husband or partner (APAV, 2005).

According to data collected by APAV, in 2002 there were 6000 complaints and more than 18000 aggressions, meaning that only 33% of victims reported to the police. Moreover, the same organisation concluded that the police did not pursue the case in 61.5% of the complaints initially reported and, among those which reached the end of the process, only in 6.6% of cases was the aggressor condemned in court (APAV, 2003).

Moreover, there are cases in which the court decision seemed to be punishing the victim, rather than the aggressor, as was the case with a contentious decision by the Supreme Court of Justice on 10 November 2004 in which the court reduced the punishment of a man for murdering his wife because she had “sometimes burned the meals she was

<sup>47</sup> More on this can be found in <http://www.umarfeminismos.org/observatorioviol/estatisticas0506.html> [accessed 08/04/2008].

cooking, would go out and get home at night, went out for coffee without notifying her husband, showed her tummy while she was with friends discussing physical shape”.<sup>48</sup> Disregarding regular abuses perpetrated by the man, such as slapping and punching, this court of appeal decided to reduce his initial sentence from 14 to 11 years in prison.

In June 2004 another court case of a man murdering his wife. The court shortened the sentence from 18 to 15 years prison because the husband suspected the wife was being unfaithful, as they had not had sex for over a year.<sup>49</sup>

### **3.1.8. To what extent are the two parties to a marriage treated as a couple/ unit, and to what extent are they treated as individuals?**

The law gives mixed messages in this respect. On one hand, it seems to treat parties in a marriage as individuals. For example, by changing the assets regime law in 1967, from a general sharing of assets regime to a sharing of acquired assets regime, there seems to be a legal recognition of individuality within the marriage. In fact, the two spouses are now expected to own individual property before the marriage and marriage does not take away each person’s right to individual property (please refer to section 1.10 later on in this report).

On the other hand, married individuals are treated as units by the tax system. Article 59 of the IRS Code establishes that married people must submit a joint tax return. Either party can make it (man or woman). The same does not apply to parties in a de facto union, who may decide whether they want to submit a joint tax return or if they prefer individual taxation (article 14, Decree n. 198/2001). Again, in case of a joint tax return, either party can make it (man or woman).

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<sup>48</sup> As published in the newspaper *Público*, 24/11/2004.

<sup>49</sup> As published in the newspaper *Jornal de Notícias*, 30/06/2004, [http://jn.sapo.pt/2004/06/30/sociedade/recusa\\_sex0\\_leva\\_supremo\\_a\\_reduzir\\_p.html](http://jn.sapo.pt/2004/06/30/sociedade/recusa_sex0_leva_supremo_a_reduzir_p.html) [accessed 14/06/2008].

### 3.1.9. Is there legislation/ public debate about forced marriages?

Forced marriage is not extensively debated in Portugal. However, among the grounds for considering a marriage to be null, one reads that a marriage can be nullified when it was celebrated against the will of one or both spouses [*nubentes*], or when their will was biased by error or coercion (article 1631 of the Civil Code; same idea is reinforced in article 1635). The law also establishes that “the declaration of will, expressed during the ceremony, constitutes an assumption that both parties [*nubentes*] wanted to get married, but also that their will is not biased with error or coercion” (article 1634 of the Civil Code, first established in 1967).

### 3.1.10. What is the status of pre-nuptial agreements? Is there an issue about “assets regime” to be decided prior to marriage?

The current assets regime was introduced in the Civil Code in 1978 (law-decree n. 496/77). Before then it had been established in 1967, through law-decree n. 47344, article 1738 of the Civil Code (published in *Diário do Governo*, n. 274, Series I, Part A, 25/11/1966).

Before getting married, the future spouses can decide which “assets regime” [*regime de bens*] they want to choose. The assets regime is, in fact, a pre-nuptial agreement, that consists of rules determining who owns the property of married people. After this agreement is signed, the general rule is that the wedding should take place within 1 year, at the most. There are three legal assets regimes:

- a) sharing of acquired assets regime [*regime da comunhão de adquiridos*] – each spouse owns what s/he already owned before getting married or what s/he will receive after his/her spouse’s death; all assets bought after getting married belong to both spouses
- b) separate assets regime [*regime de separação*] – each spouse is the owner of all

- assets s/he bought, either before or after getting married; in case there is an asset bought by both of them, then they are equally owners as in shared-property ownership and not because they are married
- c) general sharing of assets regime [*regime da comunhão geral*] – regardless of origin or moment of acquisition, all assets belong to both spouses, except for each person's clothes or personal letters. This common patrimony includes also debts, for which each spouse is equally responsible in 50%.

Whenever the spouses do not choose the assets regime they wish, the law assumes it is going to be sharing of acquired assets regime. This applies to weddings celebrated after 01/06/1967; before then the premise was the general sharing of assets regime.

However, there are some restrictions concerning the choice of the assets regime. For instance, when one of the spouses is over 60 years old, the law establishes that the regime of separate assets is obligatory (article 1720 Civil Code). And when one of the spouses already has children, even if they are over 18 or have left home, the law impedes the regime of general sharing of assets.

## 3.2. *Divorce*

### 3.2.1. What is the law on divorce – grounds for divorce, etc?

After the dictatorship divorce became available in 1975 (law-decree n. 261/75). This law has been updated on different occasions since then (law-decree n. 561/76, law-decree n. 605/76, law-decree n. 496/77, law-decree n. 163/95, law n. 47/98, law-decree n. 324/2007). There are two types of divorce in Portugal – litigious divorce and mutually consensual divorce (article 1773, Civil Code<sup>50</sup>).

The process of a litigious divorce (initiated by one of the spouses) can be initiated on the grounds of ‘violation of conjugal obligations’ or ‘rupture of the life in common’ (separation). The former is when there has been a violation of the following conjugal duties

- respect (words or actions damaging the honour of the other spouse, their reputation, public image, self-respect, self-esteem, sensibility or personal susceptibility);
- fidelity (adultery, thereby failing to fulfil the duty of exclusive and sincere dedication to the other spouse);
- cohabitation (deserting the marital home);
- cooperation (failing to fulfil the duty to provide help and support and failing to assume the responsibilities inherent in family life);
- and assistance (not fulfilling the obligation to provide maintenance and to contribute to the costs inherent in everyday family life).

The latter – rupture of the life in common – can be argued where there has been a separation for more than 3 years, if one of the partners’ mental faculties has changed for more than 3 years or if one of the partners had left without sending any news for more than 2 years. In these cases the judge always decides in terms of guilt.

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<sup>50</sup> According to law-decree n. 561/ 76, law-decree n. 496/77 and law n. 47/98.

In case of a mutually consensual divorce, there is no need to reveal the motive and the judge does not assess who is guilty. All both parts need to do is to handle documents containing their agreement concerning eventual alimony [“food fee” or *pensão de alimentos*], exercise of parental power and what will happen to the family house. *Pensão de alimentos* or “food fee” entails anything which is essential to the maintenance, housing and clothing of a person, as well as his/her education in case of being a minor.<sup>51</sup> According to the Census 2001, between 1991 and 2001 there was an increase of 104.2% in divorce.

### **Comment**

A new Divorce Law is being discussed in Parliament at the moment of writing [2008]. Major changes announced include the removal of the concept of guilt and litigious divorce. Instead one of the spouses can require a divorce “without the consent of one of the spouses” in cases when there is a de facto separation for over a year, when the mental capacity of the other spouse changed for over a year, endangering the life they share, the absence without any form of contact for over a year, and any other reasons that, regardless of guilt, show definite disruption of marriage. Concerning property, the new law will be based in the regime of acquired assets, even if the property regime when the spouses married was a shared assets regime. However, in cases when one of the spouses had contributed much more to family life than the share s/he would get after the divorce, this spouse may apply for specific compensation. This can only be done at the moment of decision-making concerning property. Concerning children, the notion of “paternal power” will be replaced by “parental regulation”, and the child can now be trusted to a member of the family in situations when none of the parents can perform their parental responsibilities.<sup>52</sup>

<sup>51</sup> Source: European Judicial Network on Civil and Commercial Matters.

<sup>52</sup> This law was approved in the General Discussion on the 16/04/2008 and by the Speciality Commission on the 02/07/2008. *Público* online, 02/07/2008.

### **3.2.2. What is the history of divorce legislation? When did it become first available?**

The Civil Code of 1867 did not allow divorce, as marriage was defined as a perpetual contract. Divorce was legally introduced in Portugal on the 3 November 1910 (Divorce law, Decree 3). Divorce by mutual agreement was allowed. Then, 1940, after signing a Concordat with the Holy See, divorce for Catholic marriages celebrated after 1 August 1940 stopped being possible. However, divorce was still available for civil marriages. This situation became even stricter with the new Civil Code, in 1967, whereby divorce in civil marriage was subject to a 3-year waiting period and required the approval of a judge (thus removing the possibility of divorce through mutual consent).

In 1975, the *Concordata* was changed so that Catholics could access civil divorce (law-decree n. 187/75, 4<sup>th</sup> April). On the 27<sup>th</sup> May 1975, a new Divorce Law was approved, extending the possibility of divorce to Catholic marriages. But in 1977, Decree 496 established a minimum of 3 years of marriage for filing for divorce. This minimum period of marriage was abolished in 1998, through Law N. 47. After 2001 (Decree 272) mutually agreed divorce can only be filed in civil registration office, something which was previously available (after 1995) only for couples with no children or whose custody had already been judicially decided (Coelho & Garoupa, 2006: 525-542).

In May 2007, the Left Block presented a proposal to change the Divorce Law, which would change in the waiting period (3 years) amongst other changes. This proposal was rejected by the majority of MPs. However, a new Divorce Law is being discussed in the Parliament at the moment of writing (see previous comment box).

### **3.2.3. Do the major religious groups actively oppose divorce?**

With very few exceptions, the Ecclesiastical Code (i.e. of the Catholic Church) does not allow for the possibility of divorce in religious marriages.

On the official website of the Portuguese Catholic Church it is stated that, despite legal changes, there is a “strong appeal to Catholic married couples that they abide by the serious duty of not filing for civil divorce” (<http://www.ecclesia.pt/sos/>). In May 2008, the Dean of the Fatima Sanctuary (pilgrimage worship shrine), Luciano Guerra, issued a document which attacked Portuguese politicians for “encouraging early (irresponsible) relationships between teenagers, facilitating divorce, protecting marital infidelity, failing in preventing the abandonment of small children [by their parents]”<sup>53</sup> However, in terms of intimate citizenship divorce has not been the main issue of religious campaigning in Portugal.

### **3.2.4. What happens to property and pensions on divorce?**

In case of a litigious divorce (unilateral), the judge will decide in terms of guilt. The partner found to be guilty:

- in the sharing of assets cannot receive more than he/she would have if the marriage propriety regime had been that of acquired assets (acquired after the marriage).
- loses all benefits acquired up until then or future ones related to his/her former partner or with the former marriage
- can be sentenced to pay a fee (indemnification) to the non-guilty partner

### **3.2.5. How are decisions about children made after divorce, and what principles apply concerning residence/ custody etc?**

Decisions affecting children after divorce are included in an agreement between the parents which then needs to be approved by the court or by the Civil Registration Office (depending whether it is a mutually consensual divorce or a litigious one).

In cases where there is no agreement between the parents, the court will decide having in mind the best interest of the child.

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<sup>53</sup> Source: *Público* online, 11/05/2008.



### **3.3. *Non-marital heterosexual relationships***

#### **3.3.1. Is there law governing heterosexual cohabitation/ de facto relationships?**

The first law governing cohabitation in Portugal was Law N. 135/99, approved in 1999 exclusively for heterosexual de facto unions. Then, in May 2001 this law was replaced by Law N. 7/2001 which defines and regulates the juridical situation of two people living in a de facto union, regardless of their gender. The minimum age for being in a legally recognised de facto union relationship is 16 years old, and the law specifies a period of two years of previous cohabitation as a condition for being in a situation of de facto union.

There is no formal procedure, nor registration for a de facto union. According to the law of 1999, the local government authority would issue upon request a document which needed to be signed by two people working in the area of residence of the couple. This document was requested, for instance, by banks before granting a mortgage. After 2001, this procedure was repealed.

The impeding factors for a de facto union are similar to those impeding a marriage (being less than 16 years old, dementia, former non-dissolved marriage, direct kinship or previous sentence for manslaughter of his/her partner former spouse).

#### **3.3.2. What are the rights and responsibilities of heterosexual cohabitants/ de facto partners?**

People living in a de facto union have the right to protection of the family house, benefit from the juridical regime of holidays, bank holidays and absences that applies to married people, benefit from the taxation regime that applies to married people and pension in case of death of his/her partner.

### **3.3.3. Are there fiscal benefits and privileges for cohabitants/ de facto partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers' allowances, inheritance rights?**

De facto partners receive the same tax and social security benefits as married couples. In the case of the death of one partner, the widow/er is also entitled to a survivor's pension and, if the house they lived in was owned by the dead partner, the surviving partner has the right to live in that house for a period of 5 years and, during that same period of time, he/she would get the first refusal on the purchase of the house.

### **3.3.4. Are there social benefits and privileges for cohabitants/ de facto partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

Partners in a de facto union are legally entitled to benefit from the juridical regime of holidays, bank holidays and absence, on equal footing with married spouses. This regime includes the possibility of an event of illness. For example, in case of death of the partner, the surviving partner is entitled to 5 days of absence (article 227 of the Labour Code). In case of disease, the right to assist the ill partner is equivalent to married spouses. The same applies to friends or other relatives living under the shared economy law (please refer to sections 9.2 and 11.2 in this report).

Partners in a de facto union are also entitled to access the social security system (welfare) and will receive benefits in case his/her partner dies, in case his/her death results from accident at work or repetitive strain injuries / industrial injuries<sup>54</sup>, or in military duty.

### **3.3.5. How different from marriage are non-marital heterosexual relationships in terms of fiscal benefits and social benefits?**

People living in a de facto union relationship are not entitled to some of the rights ascribed to legally married people. Partners in a de facto union cannot choose to adopt

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<sup>54</sup> The list of repetitive strain injuries / industrial injuries is defined in Decree N. 6/2001, 5 May.

his/her partner's surname and cannot choose the assets / property regime they would prefer. In terms of inheritance, partners in a de facto union are not the heirs of one another, unless their previous will determines otherwise. Each one of them can make a will benefiting the other partner, but there is a limited share available for that (taking into account other existing heirs, regardless of the will). This is different from marriage, whereby the surviving spouse is entitled to half of all assets (according to the regime of assets that applies – please refer to section 1.10). The other half is divided equally between the descendants and the spouse.

Concerning taxes, partners in a de facto union can opt to pay their taxes together (as a couple) or separately (as individuals). This choice is not available to married couples who must submit a joint tax return (please refer to section 1.8 in this report). Debts, however, are exclusively the responsibility of the indebted individual.

	<b>Married couples</b>	<b>De-facto unions</b>
<b>Married Couple's Allowance</b>	No	No
<b>Wedding licence (15 day absence)</b>	Yes	No
<b>Capital gains tax exemption</b>	Yes	Yes
<b>Benefits on Inheritance tax</b>	Yes	No
<b>Automatic Inheritance</b>	Yes	No
<b>Access to deceased partner's bank account</b>	Yes	No
<b>Bereavement benefit</b>	Yes	No
<b>Welfare benefits</b>	Yes	Yes
<b>Next of kin</b>	Yes	No
<b>Protection from domestic violence</b>	Yes	Yes
<b>Adoption Rights</b>	Yes	Yes (excluding same-sex couples)
<b>Father's parental responsibility</b>	Yes	Yes
<b>Assisted conception</b>	Yes	Yes (excluding same-sex couples)
<b>Juridical regime of holidays, bank holidays and absence</b>	Yes	Yes
<b>Family reunion</b>	Yes	Yes

### **3.3.6. What is the law (if any) regarding domestic violence, and what are the policy initiatives to combat it?**

The law on domestic violence is not based on the marital status of the aggressor/victim. Therefore all policy mentioned previously (see section 1.7.) aiming to prevent and sanction domestic violence applies equally to married and cohabiting people.

Furthermore, a recent revision of the Penal Code (2007) clearly established the equivalence between married people and non-married people (even when they are not cohabiting) for the purposes of punishing domestic violence. Article 152 refers to “people living in a similar situation to spouses, even if they are not cohabiting”.<sup>55</sup>

### **3.3.7. To what extent are the two parties to a cohabitation/ de facto union treated as a couple/ unit, and to what extent are they treats as individuals?**

For taxes purposes, the two parties can opt either to pay taxes as individuals or as a couple, which indicates a certain tendency of the state to recognise individuals (rather than units).

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<sup>55</sup> Source: *Diário da República*, n. 170, 04/09/2007.

### **3.4. The Regulation of Sexual Practice**

#### **3.4.1. Have homosexuality and lesbian sexuality been criminalized? What was illegal? What is the history of decriminalization?**

Homosexuality was criminalised by a law dating from 1912, which outlawed same sex behaviour in the same way as it outlawed prostitution and vagrancy. During the dictatorship, in 1936, the regime established the so called *Mitras*, places in which homosexuals were taken and tortured after being arrested. Alternatively, they were confined in institutions for forced labour (Bastos, 1997: 239-239). Despite the illegality of some of the measures used to restrict homosexuality, police raids conducted by *arrebentas* were common. *Arrebentas* – or demolishers – as these police officers became known, raided places often used for same-sex encounters (e.g., public toilets, parks or beaches) in order to extort money from identified suspects in exchange for freedom (Bastos, 1997: 239). Still under the dictatorship, the Penal Code of 1966 stipulated a maximum two-year sentence “to whomsoever frequently makes an indecent assault on someone of the same sex” (Article 253).

Amendments to the Penal Code in 1982 decriminalized homosexual relations, as long as they take place in private between people over sixteen. This decriminalisation included both male and female homosexuality, representing an interesting move away from gendered laws of sodomy existing in other countries.

#### **3.4.2. What is the age of consent (hetero/ homo)?**

It was the new Penal Code of 1982 which introduced different ages of consent for same sex and different sex relations, punishing “homosexuality with minors” (article 207). Therefore, sex between an adult and a minor was permissible from the age of 14 amongst heterosexuals, as against 16 for same-sex relations. The revisions of the Penal Code in 1995 replaced “homosexuality with minors” with “induced misconduct of minors by

adults of the same sex”. This article repeated interdictions already lay down in previous articles – “sexual abuse of children” (art. 172), “sexual abuse of teenagers and subordinates” (art. 173) and “rape” (art. 174) – apparently aiming at additionally punishing the sexual orientation of the abuser.

In 2004 and 2005 the Constitutional Court issued two sentences in which article 175 of the former Penal Code was considered to be against the Constitution, thus declaring illegal the existence of different ages of consent and pushing for legal reform.<sup>56</sup> If there had been a third sentence of the Constitutional Court declaring article 175 unconstitutional, the article would have been revoked straight away. However, that was not the case as changes were introduced in September 2007, when the Penal Code was revised.

Today, anyone practicing “relevant sexual acts” with people younger than 14 years old can get to 3 to 10 years prison sentence, for “sexual abuse of children” (article 171). In addition, anyone who is over 18 and practices “relevant sexual acts” with someone who is between 14 and 16 years old can be sentenced up to 3 years, for “sexual acts with teenagers” (article 173).

As mentioned, both articles were included in the latest revision of the Penal Code (2007) and do not mention sexual orientation (it is the same regardless of sexual orientation). Therefore, depending on the age of the abuser, the minimum age of consent will be either 14 or 16.

The law on the age of consent refers to a juridical notion that requires some further explanation – “relevant sexual acts”. The notion has generated some doubts expressed in some of the court sentences dealing with the issue, due to the imprecision of the term “relevant”. Judge Vitor Simoes, however, identified certain sexual acts as relevant – namely oral sex, masturbation, “kissing in erogenous areas of the body such as breasts,

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<sup>56</sup> In 2004 the accused was the British citizen Michael Burrridge who had been previously condemned to 34 months in prison by the Oeiras Court in March 2004 due to “homosexual acts with teenagers”. In 2005 the sentence was related to a scandal involving paedophilia in Azores.

pubis and genitals”, “undressing a woman and forcing her to remain naked for the sexual appetite of the agent” – and excluded others which are not considered as relevant sexual acts – namely pinching and kissing.<sup>57</sup>

#### **Comment**

Concerning same-sex intergenerational relationships, there was an interesting case reported by the Portuguese media in July 2007, whereby a female teacher was suspended for 90 days from her job after suspicion that she might have sexually abused a female teenager age 14. More on this at <http://ultimahora.publico.clx.pt/noticia.aspx?id=1299944>

### **3.4.3. Is incest illegal? What is its definition?**

Until 1982, incest was legally defined as a crime. After the revision of the Penal Code in 1982 (in force in January 1983), there is no legislation concerning incest. The rationale behind this was that what is expected from the legislator is to protect the freedom of self-determination and not to guard sexual morality, and therefore the Penal Code stopped criminalising consensual sexual behaviours (*condutas*) between adult people, in private, including homosexuality, prostitution and incest. These used to be included under the categories of “crimes against honesty” (sic; perhaps decency, in English law, is the equivalent) or “crimes against custom” (sic; perhaps tradition is the equivalent).

When any case of incest goes to court it involves other factors – e.g., when minors are involved, then the case is treated as sexual abuse of minors.

However, certain degrees of kinship and affinity are considered as impeding factors for marriage (article 1602 Civil Code), namely direct kinship (parents and children), kinship in 2<sup>nd</sup> degree (siblings) and direct affinity (parents in law and children in law).

<sup>57</sup> Sentence accessed in 29/01/2008. Available, in Portuguese, at [http://www.verbojuridico.net/jurisp/1instancia/li\\_abusosexual.html](http://www.verbojuridico.net/jurisp/1instancia/li_abusosexual.html).

**Comment**

Despite not being a crime, incest is a good example of a topic which is socially considered to go against the dominant morality, and that is often believed to be illegal. This would probably explain why there is not much social debate on the issue. Only very recently (2007) two blogs were created dealing with incest, both written by young males – one (19 years old) has a relationship with his father and another (24 years old) with his mother. They can be found respectively at <http://filhoepai-incesto.blogspot.com/> and <http://incestoportugues.blog.com/>

**3.4.4. What is state policy around sex education in school?**

In 1984, after a period of social and political debate over the issue, a law on sex education was passed by Parliament. However, the specific regulations which would determine how the law would come into force never existed and therefore the Law N. 3/84 was never applied. In 1986 the General Law on the Educational System was approved and it explicitly included sex education under the thematic category of Personal and Social Training. Nevertheless, sex education initiatives did not become reality for another 9 years.

Between 1995 and 1998, the Family Planning Association, with the support of the Ministry of Health, conducted an experimental project called “Sex Education and Health Promotion in Schools”. This was the first time that such an experience took place in a regular way, congregating different levels of study development. From this experience a report, called “Technical guidelines about sex education in schools” was produced.

In October 1998, after a decision of the Council of Ministers, the “Inter-ministry Report for the Creation of an Action Plan in Sex Education and Family Planning” was published. From this resolution a protocol among the Ministry of Education and three non governmental organisations (NGOs) resulted, who were then placed in charge of providing schools with specific training on sex education. Nonetheless, the approach was



autonomously chosen by each of these three NGOs: Family Planning Association (since 2000), the Portuguese Foundation Community against AIDS (2003) and the Pro-Life Movement (2003). The differences among them were blatant, with pro-life activists providing moral-based information (e.g., emphasising abstinence as contraception), in opposition to the scientific and human rights approaches followed the other two NGOs. This protocol lasted until December 2005.

In June 1999, the Parliament passed another law (Law N. 120/99) aiming to reinforce the right to sexual health. That law, whose specific regulations were established and published by the Law N. 259/2000, 17 September, determines that:

“there shall be implemented a programme for the promotion of health and human sexuality, making available appropriate information on human sexuality, the reproductive system, Aids and other sexually transmitted diseases, contraception and family planning, interpersonal relationships, shared responsibilities and gender equality” (Law N. 120/99, article 2).

However, Portuguese schools never implemented such a programme in an organised way. Instead, each school autonomously decided whether to invest in sex education, very often leaving that decision to students and teachers’ initiative. On the part of the state, between 2000 and 2005 the most relevant initiative was a document prepared by the Ministry of Education and the Ministry of Health containing technical guidance.<sup>58</sup> The lack of sex education in schools has led to social dissatisfaction.<sup>59</sup>

In 2005 the Working Group on Sex Education was created (Decision No. 19 737/2005), in charge of generating general guidelines for the application of sex education curricula in schools. After a final report stressing the importance of articulating with families and health centres, the Minister of Education approved the guidelines suggested (Decision No. 25 995/2005), which determined a transversal approach to sex education in schools

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<sup>58</sup> That document was called “Sex Education in Schools, Guidelines”.

<sup>59</sup> For instance, in March 2005, students’ organisations started a national campaign to demand, among other things, the implementation of the Sex Education Laws in schools. A year before, on 3 March 2004, the newspaper *Diário de Notícias* had published an opinion poll according to which 78% of 802 respondents were in favour of the creation of a module on sex education. However, 53% agreed it should be the parents who decide whether their children should or should not attend those classes.

by different disciplines, reinforcing the role of medicine and health professionals in sex education.<sup>60</sup> In February 2006 a protocol was signed between the Ministry of Education and the Ministry of Health.

Many of the delays in this process can be traced back to conservative sectors in society – namely the Catholic Church and right-wing political parties – who have acted as blockers or detractors of each initiative interpreted as progressive.<sup>61</sup>

There have been not many more developments in this field, except for January 2007 when the Working Group on Sex Education handed to the Minister of Education a report recommending that every school should prepare its plan for sex education and that there should be at least one class a month on sex education. Once again preparation seems to replace implementation.

Finally in September 2007 the final report of the Working Group on Sex Education was launched. In this report, the link between sex education and health and biology is reinforced.<sup>62</sup>

### **3.4.5. What is the law concerning prostitution – is it legal/ tolerated/ illegal? Who is prosecuted (the prostitute or the purchaser of sex)?**

The Penal Code does not punish the sex worker or the client. Instead what is a crime, punishable from 6 month to 8 years depending on aggravating factors, is the fomentation

<sup>60</sup> More information available at <http://www.dgidec.min-edu.pt/EducacaoSexual/default.asp> [accessed 14/01/2008]

<sup>61</sup> The following two examples are meaningful:

In November 2005, the Portuguese Episcopal Commission issued a document expressing their concern about sex education, underlining that “(...) it should be up to families to decide about the basic educational orientations they wish for their children, in consonance with their values, beliefs and cultural context”. In this document, handed to the General Board of Innovation and Curricula Development – the ministerial entity responsible for sex education – Catholic bishops emphasised the need to put sexuality into perspective, together with love and ethics. (This document available at <http://www.agencia.ecclesia.pt/noticia.asp?noticiaid=25301>, [accessed 14/01/2008]).

In December 2005 a group called MOVE – Movement of Parents handed the minister of education a petition signed by 24000 people who disagreed with the contents of sex education that were announced by the government, based on the expertise of Association for Planned Parenthood (APF).

<sup>62</sup> Available at [http://sitio.dgidec.min-edu.pt/saude/documents/gtes\\_relatorio\\_final.pdf](http://sitio.dgidec.min-edu.pt/saude/documents/gtes_relatorio_final.pdf). [accessed 14/01/2008].

of prostitution with the intention of profit [*lenocínio*] (article 169). Therefore brothels are not allowed, but prostitutes can be in a bar because the premise is that they are there willingly and not to favour someone else. But even the question of self-determination and right to choose in the case of the sex worker is not to be found anywhere in Portuguese law. In fact, this question is absent.

However, there are circumstances in which the clients are punished. For instance, if the prostitute is aged from 14 to 18 years old, the sex buyer can be sentenced up to 3 years in prison (article 174), whether the act is attempted or consummated (i.e., the attempt is in itself punishable).

#### **3.4.6. Is there a public debate about prostitution, and if so, what are its parameters?**

In 2005 the Government's intentions to change the law in order to legalise prostitution became public. However, the issue soon stopped being debated, possibly due to other issues gaining more visibility and political attention (e.g. abortion). There was a study conducted at the Centre for Social Studies, University of Coimbra, on trafficked women in Portugal, the results of which were published in October 2007. That was another occasion in which prostitution and trafficking were debated. In 2008, during the Feminist Congress held in Lisbon, there was a session on trafficking. However, the debate that followed the papers was highly focused on prostitution versus sex work. It was clear that this is a controversial issue for Portuguese feminists, who seem torn between the right to make choices about one's body and being female prostitutes as victims of a system of male domination which pushes them to sell their bodies. There was general agreement that this issue requires more internal debate within women's organisations, and that prostitutes themselves should be heard in this debate.

### 3.4.7. Is there policy around trafficked women?<sup>63</sup>

In 2001, a change in the Penal Code redefined the crime of trafficking people and fomenting prostitution [*lenocínio*] (Law N. 99/AR, published in DR Series A, n. 197, 25/08/2001).

Fomenting prostitution with the intention of profit [*lenocínio*] is considered a crime. According to the recently revised Penal Code (2007), this is punishable from 6 months to 8 years, depending on aggravating factors; among these aggravating factors is using violence or serious threat and taking advantage of a particularly vulnerable situation on the part of the victim (article 169). Trafficking is also considered a crime and the offender gets up to a 10 year sentence in jail (article 160).

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<sup>63</sup> For more on this topic, see Sousa Santos *et al*, 2008.

### **3.5. *Same-Sex Partnerships***<sup>64</sup>

#### **3.5.1. What is the age of consent?**

The minimum age of consent for a de facto union legally recognised is 16, regardless of sexual orientation.

#### **3.5.2. What is the history around the age of consent? [same as 4.2.]**

It was the new Penal Code of 1982 which introduced different ages of consent for same sex and different sex relations, punishing “homosexuality with minors” (article 207). Therefore, sex between an adult and a minor was permissible from the age of 14 amongst heterosexuals, as against 16 for same-sex relations. The revisions of the Penal Code in 1995 replaced “homosexuality with minors” with “induced misconduct of minors by adults of the same sex”. This article repeated interdictions already lay down in previous articles – “sexual abuse of children” (art. 172), “sexual abuse of teenagers and subordinates” (art. 173) and “rape” (art. 174) – apparently aiming at additionally punishing the sexual orientation of the abuser.

In 2004 and 2005 the Constitutional Court issued two sentences in which article 175 [“induced misconduct of minors by adults of the same sex”] of the former Penal Code was considered to be against the Constitution, thus declaring illegal the existence of different ages of consent and pushing for legal reform.<sup>65</sup> If there had been a third sentence of the Constitutional Court declaring article 175 unconstitutional, the article would have been revoked straight away. However, that was not the case as changes were introduced in September 2007, when the Penal Code was revised.

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<sup>64</sup> An in-depth study of same-sex rights and demands in Portugal can be found in Santos, 2008.

<sup>65</sup> In 2004 the accused was the British citizen Michael Burrridge who had been previously condemned to 34 months in prison by the Oeiras Court in March 2004 due to “homosexual acts with teenagers”. In 2005 the sentence was related to a scandal involving paedophilia in Azores.

Today, anyone practicing “relevant sexual acts” with people younger than 14 years old can be sentenced to 3 to 10 years in prison, for “sexual abuse of children” (article 171). In addition, anyone who is over 18 and practices “relevant sexual acts” with someone who is between 14 and 16 years old can be sentenced to up to 3 years, for “sexual acts with teenagers” (article 173).

Both articles were included in the latest revision of the Penal Code (2007) and do not mention sexual orientation (it is the same regardless of sexual orientation). Therefore, depending on the age of the abuser, the minimum age of consent will be either 14 or 16.

The law on the age of consent refers to a juridical notion that requires some further explanation – “relevant sexual acts”. The notion has generated some doubts expressed in some of the court sentences dealing with the issue, due to the imprecision of the term “relevant”. Judge Vitor Simões, however, identified certain sexual acts as relevant – namely oral sex, masturbation, “kissing in erogenous areas of the body such as breasts, pubis and genitals”, “undressing a woman and forcing her to remain naked for the sexual appetite of the agent” – and excluded others which are not considered as relevant sexual acts – namely pinching and kissing.<sup>66</sup>

### **3.5.3. Is there provision for the recognition of same-sex partnerships (or are same-sex partners “legal strangers”)?**

Yes, same-sex de facto unions are recognised under Portuguese law since 2001. In 1999, after much controversy, a de facto union law was approved for different-sex couples only, which generated extensive protest on the part of the LGBT movement. The government’s suggestion was to create another law – shared economy law – which would apply to several situations, including same-sex couples, but also sisters or brothers or friends sharing resources together. Faced with that possibility, the LGBT movement mobilised and organised the first kiss-in ever in Portugal in 2000, in front of a civil

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<sup>66</sup> Sentence accessed in 29/01/2008. Available, in Portuguese, at [http://www.verbojuridico.net/jurisp/1instancia/li\\_abusosexual.html](http://www.verbojuridico.net/jurisp/1instancia/li_abusosexual.html).

registration office, with banners saying “This is not a shared economy”.<sup>67</sup> This event obtained wide media coverage and put pressure upon the MPs to introduce an inclusive de facto union law. As a result, two laws were approved in the same day (15 March 2001) – an inclusive de facto union law and the shared economy law (more on shared economy law in section 3.9.2. in this report).

**3.5.4. If so, what is it called – and has there been a debate about whether it should be “marriage” or not? Outline the parameters of the debate in parliament, and in the media, and who the key players were/ are, including religious groups, if applicable.**

Legally recognised cohabitation in Portugal is called de facto union, and the law includes both same-sex and different-sex couples (Law N. 7/2001, 11 May). The only difference concerning sexual orientation is the possibility of adoption, which is the exclusive privilege of different-sex couples.

There is no formal procedure, nor possibility of registration for a de facto union.

After 2005 (when same-sex civil marriage became available in Spain), the LGBT movement started campaigning for changing the definition of marriage in the Civil Code, as to allow same-sex couples the possibility to marry. The idea is not a replacement of the de facto union law, as there is an understanding that there should be diversity of family models within the law. The main argument is to stop discrimination based on sexual orientation in the law, and the definition of marriage in the Civil Code is an example where discrimination still remains. The debate has been mainly in Parliament and in the media, particularly after February 2006 when two women started a judicial process to get married, trying to get legal change through a court decision. After consecutive negative decisions on the part of lower courts, at the moment of writing [December 2008] the case is in the Constitutional Court (since July 2007), awaiting a decision. Religious groups have been moderate in their public statements concerning this case, but the couple has

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<sup>67</sup> This kiss-in took place on the 6 February 2000, in front of the 6<sup>th</sup> Civil Registration Office, in Lisbon.

endured tremendous amounts of social discrimination on the part of neighbours and future employers.

### **3.5.5. If there is recognition, what does it entail? Rights and responsibilities?**

In law, rights and responsibilities are the same for any de facto union, regardless of sexual orientation. There is one exception, however. What it does not entail is the right to adoption. This is a major difference between same-sex and different-sex partners in a de facto union, as the de facto union law is explicit in saying that it gives the right to different-sex partners to adopt (article 7).

### **3.5.6. Are there fiscal benefits and privileges for registered same-sex partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers' allowances, inheritance rights?**

The same as for non-marital heterosexual relationships.

De facto partners get the same tax and social security benefits as married couples. In case of death of one partner, the widow/er is also entitled to a survivor's pension and, if the house they lived in was owned by the death partner, the surviving partner has the right to live in that house for a period of 5 years and, during that same period of time, he/she would get the first refusal for that house.

### **3.5.7. Are there social benefits and privileges for registered same-sex partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

The same as for non-marital heterosexual relationships.

Partners in a de facto union are legally entitled to benefit from the juridical regime of holidays, bank holidays and absence, on equal footing with married spouses. This regime includes the possibility of an event of illness. For example, in case of death of the partner, the surviving partner is entitled to 5 days of absence (article 227 of the Labour Code). In



case of illness, the right to assist the ill partner is equivalent to married spouses. The same applies to friends or other relatives living under the shared economy law (please refer to sections 3.9.2 and 3.11.2 in this report).

Partners in a de facto union are also entitled to access the social security system (welfare) and will receive benefits in case his/her partner dies, in case his/her death results from accident at work or repetitive strain injuries / industrial injuries<sup>68</sup>, or in military duty.

### **3.5.8. Is there recognition of same-sex domestic violence, and are there policy initiatives to combat it?**

According to a study dating from 2006, the figures for same-sex domestic violence in Portugal are close to different-sex domestic violence – 21% of respondents identified as victims and 16% as aggressors.

There has been some debate around same-sex domestic violence, particularly after the Judges Union Association came to public in December 2006 stating that there could not be the legal recognition of same-sex domestic violence as same-sex civil marriage was not allowed. Furthermore, it was also stated that domestic violence presupposes a physical strength difference, which is absent from same-sex relationships and that same-sex families were nothing but ideology-driven banners, for advocacy purposes.<sup>69</sup> Earlier that year a representative of the Public Relations Department of the Police had stated that “from the juridical point of view, there is no such thing as domestic violence between homosexual couples. In Portuguese law, a couple is a man and a woman, therefore, according to the law, it is not domestic violence. There are no homosexual couples”.<sup>70</sup> In the same article also clarified that “when a homosexual goes to the police station as a victim of violence on the part of his [sic] partner, he [sic] will be treated as any other citizen who is victim of aggression”.

<sup>68</sup> The list of repetitive strain injuries / industrial injuries is defined in Decree N. 6/2001, 5 May.

<sup>69</sup> Published in *Diário de Notícias*, 20/12/2006.

<sup>70</sup> Published in *Correio da Manhã*, 30/03/2006, <http://www.correiodamanha.pt/noticia.asp?id=196647&idselect=9&idCanal=9&p=94>.

Despite these statements, the new Penal Code, which came into force in September 2007, included among potential victims of domestic violence a person, either same-sex or different-sex, with whom the aggressor has or has had a relationship similar to married partners, regardless whether it was cohabiting or not (article 152).

### **3.5.9. Which terms were/are used to describe homosexuality in the law?**

In the previous versions of the Penal Code the word used was “homosexual”, in the context of identifying a particularly aggravating situation of sexual abuse of children (when the aggressor was “a *homosexual*”). Those aggravating factors have been removed from the law.

Therefore presently there are only two situations referring to LGBT issues. One is the prohibition to discriminate based on *sexual orientation* (article 13 of the Constitution, after 2004) and the other one is the definition of marriage in the Civil Code (articles 1577 and 1628, written in the Civil Code in 1967) which declares to be legally inexistent the marriage between “*two persons of the same sex*”.

### **3.6. Parenting and Reproduction**

#### **3.6.1. How are mothers/ parents supported financially and socially by the state? (tax allowances, maternity leave, parental leave for fathers/ partners, for care of older children, child benefit, child care provision).**

Both the father and the mother have equal rights and duties regarding their children according to the Law on the Protection of Maternity and Paternity (Law N. 4/84, 5<sup>th</sup> April). The current law states the following:

##### **Maternity leave:**

- 120 days earning 100% of her salary, 90 of which must follow the date of birth. In case of twins, there is a extra period of 30 days for each child.
- (or)
- 150 days earning 80% of her salary.
- 14 to 30 days (depending on doctor's prescription), in case of abortion
- in case of serious risk to the mother or the foetus, maternity leave can be taken before the birth for the amount of time considered necessary by a doctor.

##### **Paternity leave:**

- 5 working days, consecutive or not, to enjoy in the following month of birth
- (and)
- Same period as for the maternity leave in the following cases: a) the mother is physically or psychologically unwell; b) the mother is dead; or c) the parents have agreed so and, in this case, the mother must enjoy a mandatory 6 weeks leave, with the father enjoying the remaining days (6 or 10 weeks, depending on the leave being of 120 or 150 days). The father will earn 100% of his salary in case of 120 days leave and 80% in case of 150 days leave (the same as mothers).

### **Parental leave:**

- 15 days given to the father to be enjoyed immediately after the paternity leave (5 working days), earning 100% of his salary. In order to enjoy the parental leave, the father must notify the employer 30 days in advance.<sup>71</sup>

Recently, the Decree N. 308-A/2007, of 5 September, established two new measures aiming to promote having children and supporting families:

- Pre-birth family allowance: given to the pregnant woman after the 13<sup>th</sup> week of pregnancy. This is equal to the amount for family allowance, for 12 months, and it is given according to the number of newborn children. The amount of family allowance is decided based on the income of each member of the family.<sup>72</sup>
- Increase in the family allowance: the amount received per child increases when another child is born or included in the family – twice in the case of a second child is born, three times in the case of a third child and so on.

### **Child benefit and care of older children**

The family allowance for children and youth varies according to the age of the child and the average earning of his/her family unit. It is attributed monthly to the child or young person up to 16 years old in order to supplement family investment in his/her maintenance and education, as long as their families do not earn five times more the minimum amount considered for Social Support and as long as they (young person) does not work. In case of students or disabled persons, this allowance can be allocated up to 24 years old.<sup>73</sup>

### **Child Care Provision**

There is an allowance for care provision in case of illness, accident or impairment of children, adopted children or step children, as long as a) they are minors of 10 years old

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<sup>71</sup> According to Ana Cristina Silva, working at CIG, both lack of knowledge concerning this law and the amount of bureaucracy involved constitute obstacles to more fathers enjoying parental leave.

<sup>72</sup> According to law-decree 176/2003, 2 August. Available, in Portuguese, at [http://www.cga.pt/Legislacao/DL\\_20030802176.pdf](http://www.cga.pt/Legislacao/DL_20030802176.pdf) [accessed 12/02/2008].

<sup>73</sup> Law-decree n. 176/2003, 2 August; Portaria n. 421/2007, 16 April.

or, in case of disability, regardless of age, and b) they live with the employee's family unit. This allowance is available for up to 30 days each year, for each child, and the employee will earn 65% of his/her salary.

There is also a allowance for care provision in case of serious impairment and chronic disease of children, adopted children or step children, as long as a) they are minors of 12 years old and b) they live with the employee's family unit. This allowance is available for up to six months each year, up to four years, for each child and the employee will earn 65% of his/her salary.

In terms of tax relief, single parents can deduct up to 80% of the minimum wage in their tax return, whereas married couples deduct up to 50% and single or divorced people up to 60%.

As previously mentioned, unmarried or divorced parents can also get more tax relief based on education expenses of their children (up to 6500€ per child) than married couples with children do. This is being highly contested by pro-family organisations in the country which have started a petition to demand what they see as discrimination against married people.<sup>74</sup>

Concerning pre-schooling, the first public kindergarten (children over 3 years old) was created in Lisbon in 1882, in celebration of the 100<sup>th</sup> anniversary of Froebel (Cardona, 1997). The first public kindergarten was created in 1908. In 1937, during the dictatorship, public kindergarten were closed down, as the understanding was that children's education should rely upon the family, more specifically the mother (DR n. 28081/1937). Those that remained open belonged to the private sector with particular concerns in the sphere of social support, more than education (Bairrão *et al*, 1990).

In 1975-76 there were 679 pre-schools, among which 626 were private and only 53 were public (Carreira, 1996: 51). It was only in 1977 that pre-schools were also included in the

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<sup>74</sup> Petition available at <http://www.forumdafamilia.com/peticao/> [accessed 21/02/2008].

Official Educational System (Law n. 5/77), and no longer exclusively under the Ministry of Health and Assistance or Ministry of Social Solidarity. This means that, up to this day, there are overlapping Ministries concerning pre-schools. Public nurseries (for children 0-3 years old) are exclusively owned by the Ministry of Social Security/Solidarity. Some public kindergarten are owned by the Ministry of Education and others by the Ministry of Social Security/Solidarity. While the former (which started in 1978/79) are free, the latter are means-tested, i.e. the fee is dependent upon the parents' income.

The private sector is supplementing the lack of public providers. There are private institutions and semi-private (private and cooperative).

### **Maternity and Paternity Social Benefits**

Established by law-decree (25/06/2008), these benefits aim at “assuring alternative income in case of lack or lost of salary, in situations of economic need, determined by the non-existence and insufficiency of the contribution career [means tested benefit for those with irregular or no contribution to the social security system] [...] or exclusion from the provision system”.<sup>75</sup> This law came into force in August 2008.

The Maternity Social Benefit is paid to the woman who delivers living or dead children, has a miscarriage or has an abortion. In case of miscarriage or abortion, the period of days covered by the benefit varies between 14 and 30 days according to the degree of work incapacity declared by the doctor. In case of birth, the maximum period is 150 days, plus extra 30 days for each child in case of multiple twins.

Women will also be entitled to a benefit for health risk related to the work they perform and these will be paid for as long as it is considered necessary for the prevention of risks for both the woman and her child.

The Paternity Social Benefit is paid to the father of children born alive.

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<sup>75</sup> *Público* online, 01/08/2008, <http://ultimahora.publico.clx.pt/noticia.aspx?id=1337283&idCanal=62>.

This law also establishes that a specific allowance is paid to candidates for adopting children of 15 years old or less. In this case the maximum period is 100 days.

#### **Comment**

The notion of “parental responsibility” does not have a translation in Portuguese law. Instead the concept used is that of “paternal power”, including rights and duties such as care, respect, education, custody, support, etc.<sup>76</sup>

#### **Comment**

According to a study done in 2005, parental leave (15 days given to the father) is being enjoyed more and more: from 16000 fathers enjoying it in 2002, the number increased to 27000 in 2003. Also fathers are using the possibility of shared maternity/paternity leave more.<sup>77</sup>

#### **Comment**

In 2008 the government implemented a new measure consisting of dentist-vouchers for pregnant women who would then be entitled to dental treatment up to 120€. This was interpreted as a measure supporting motherhood. In July 2008, only 10% of these vouchers had actually been used.<sup>78</sup>

### **3.6.2. What is the law about registering the birth of a child, and its parents?**

The birth of any child born in Portugal must be registered within 20 days of birth in a Civil Registration Office. This applies even when the parents do not hold Portuguese citizenship. After the child being registered, he/she has the name that is written in his/her

<sup>76</sup> Available at [http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_por\\_pt.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_por_pt.htm) [accessed 12/04/2008].

<sup>77</sup> These results were published in *Portugal Diario*, 13/05/2005, “Pais usam cada vez mais licenca de nascimento”, [www.portugaldiario.iol.pt/noticia.php?id=536854](http://www.portugaldiario.iol.pt/noticia.php?id=536854) [accessed 12/05/2008].

<sup>78</sup> Público online, 10/07/2008, <http://ultimahora.publico.clx.pt/noticia.aspx?id=1335024&idCanal=62> [accessed 12/08/2008].

birth certificate. There are specific rules which apply to naming (see case studies later on this report).

### **3.6.3. Who is the father (biological father versus partner of mother etc)?**

In Portuguese law there is what is called a presumption of paternity (article 1826 of the Civil Code). That article states that the law assumes that the child who is born or conceived within marriage will be the son (sic) of his mother's husband ("presumption of paternity"), unless the mother declares he is not the father. In this case, she must formally initiate the procedure aimed at removing the presumption of paternity within 60 days. In order to do so, she must go to the Civil Registration Conservatory where the child was registered in order to submit a petition explaining the facts, plus several documents and witnesses. If the mother is not married and the father of the child is not present, the child registration will not include the father's name, which can be added afterwards.<sup>79</sup>

### **3.6.4. How important is biological versus social parenting, and has there been a debate about this?**

In 2008 there was a very vivid public debate about this, because of a child being raised by a couple and whose biological father wanted to gain custody after discovering he had a biological daughter. The child was 4 years old and had never been in contact with her biological father. The social parents, who had not legally adopted her yet, tried to resist justice and kidnapped the child, which led to the social father being arrested and taken to court. From the media reports available, most people were favourable to the social parents and considered the biological father to be selfish and not caring for the child's wellbeing. However, there are other factors which contributed to the passionate

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<sup>79</sup> Source: website of the Citizen's Website, [http://www.portaldocidadao.pt/PORTAL/entidades/MJ/IRN/pt/SER\\_registo+de+nascimento.htm](http://www.portaldocidadao.pt/PORTAL/entidades/MJ/IRN/pt/SER_registo+de+nascimento.htm) [accessed 29/07/2008]. For more on this issue, see for example Costa 2008a and 2008b.



discussion about this case, such as the social status of the social parents versus biological parents, moral judgements about biological parents, etc.

### **3.6.5. What is the law concerning abortion? Give a brief history.**

Abortion is probably the oldest and more recurrent struggle for the Portuguese women's movement. Until 1984 abortion was outlawed in any circumstances. In 1984, Parliament passed a law establishing the acceptable exceptions to the abortion law, which criminalised abortion with up to three years prison sentence. The exceptions then considered in the Penal Code were four, namely "a) [when abortion] is the only means to remove danger of death or irrefutable damage for the body, physical or psychic health of the pregnant woman; b) [when abortion] is adequate to avoid danger of death or serious and lasting damage for the body, physical or psychic health of the pregnant woman, as long as it is done within the first 12 weeks; c) there are serious reasons to predict that the newborn will incurably suffer from a serious disease or malformation, as long as it done within the first 16 weeks; d) there is serious reason to believe pregnancy has resulted from rape assault, as long as it is done within the first 12 weeks" (Law N. 6/84, 11 May). The deadlines for abortion in the above mentioned cases were expanded in 1997 to 16 weeks in case of rape and 24 weeks in case of malformation.

On the 4 February 1998 the Parliament approved a law which decriminalised abortion upon request until 10 weeks. Immediately after that law passed, a political arrangement among the two major political parties (PS and PSD) led to a pioneering decision to submit this issue to the will of the electorate through a referendum, something which had never been done before. The country witnessed then the emergence of several groups of citizens, constituted in two months only, in order to campaign for the referendum about the decriminalisation of abortion.<sup>80</sup> In a country where issues of sexual politics and reproductive rights have no deep-rooted tradition, there was an ardent public debate about

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<sup>80</sup> By 14 May 1998, the deadline for groups of citizens to register with the National Election Committee in order to be entitled to radio and TV spots during the campaign, eight groups had done so: 3 in favour of decriminalisation and 5 against.

sexuality, in which an active part was played by common citizens as well as by experts. This participation around the time of the campaign was not, however, reflected in the percentage of voters at the referendum, which was of only 31.94%. The result was that anti-choice won with 50.07% against 48.28% pro-choice, thus creating a unique incident by which a law already passed in the Parliament was defeated.

According to the referendum law, though, the results are not binding unless more than 50% of the electorate votes. However, the political agenda of different parties made it impossible for the pro-choice activists to overthrow those results and change the restrictive laws. It would take another eight years, with much public debate and one major campaign together with the Dutch NGO Women on Waves in 2004 – to set up a new referendum, which took place on the 11 February 2007. In this referendum, the number of organisations increased when compared to 1998: 15 anti-choice groups and 5 pro-choice groups were then competing for votes and initiatives.

There were two intertwined dimensions at stake: health and law. Faced with a restrictive law – in Europe, only Ireland, Malta, Poland and Portugal criminalised abortion –, backstreet and self-induced abortion are the most common alternatives to women lacking the financial resources to travel abroad to get an abortion in safe conditions. The World Health Organisation believes there are between 20 and 40 thousand illegal abortions every year in Portugal. As a result, 5000 women on average end up in hospitals every year in consequence of illegal abortions.<sup>81</sup>

In terms of law, Portuguese restrictive laws have already shown the effects in recent years, with five trials of women being accused of interrupting their unwanted pregnancies. These trials, unique in the European history, have resulted into suspended sentences for women and prison sentences for health professionals and providers such as midwives. According to the Ministry of Justice, between 1998 and 2004 there were 223

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<sup>81</sup> Data provided by the Ministry of Health, published in the newspaper *Correio da Manhã*, 13/05/2006.

registered crimes of abortion, translated into 34 investigation cases and 18 people being sentenced.<sup>82</sup>

Once again, the Catholic Church mobilised many resources in order to prevent people from voting in favour of the referendum. These resources included posting letters to thousands of households, containing high quality printed leaflets and rosaries so that people would count their “prayers for life”, as well as public anti-choice statements. On 17 January 2007, the diocesan bishop [*cónego*] Tarcísio Fernandes Alves, in Castelo de Vide city, threatened to evict parishioners who would vote in favour of decriminalising abortion in the referendum set for the 11 February. Quoting article 1398 of the Canonical Law Code, the bishop continued to say that those who either vote in favour or decide to abstain from voting will be incurring a deadly sin leading to immediate expulsion. These threats, alongside the statement that those who practice an abortion were no longer entitled to have a religious funeral, were also published in regular newsletters distributed to parishioners.<sup>83</sup>

Despite the differences in resources and strategies of anti-choice and pro-choice campaigners, the results in the 2007 referendum led to a recent change in the abortion law, which now accepts that a woman may chose to stop an unwanted pregnancy up to 10 weeks, regardless of her motives.<sup>84</sup> There was also an increase of 12% in this referendum’s turn-out (compared to 1998), which may indicate more political awareness when it comes to reproductive rights.

### **3.6.6. Is there policy/ public debate around teenage pregnancy?**

Portugal has the second highest rate of teenage pregnancy in Europe (only preceded by the UK), with an estimated average of 6000 teenage mothers a year.<sup>85</sup>

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<sup>82</sup> These numbers were published in the newspaper *Público*, 25/01/2007.

<sup>83</sup> More on this in the newspapers *Jornal de Notícias*, 17/01/2007; *Correio da Manhã*, 24/01/2007.

<sup>84</sup> The law was approved in the Parliament (8 March 2007), then it was endorsed by the President (10 April 2007), it was published on the 17<sup>th</sup> April 2007 and, finally, it came into force on the 15<sup>th</sup> July 2007.

<sup>85</sup> Information published by the newspaper *Correio da Manhã*, 13/05/2006.

According to official statistical information in 2003 there were 3860 teenagers from 13-18 years old who gave birth. Concerning women of 17 years old, of the 1166 who gave birth in 2003, 64 had already one child and 2 had already two children.<sup>86</sup>

Surveys show that women<sup>87</sup> of the age group 20-24 years old experienced their first sexual intercourse at a younger age than women of the age group 45-49 – the average for the younger age group was 19,8 years old, whereas in the older age group was 21,5 (INE, 2002) – and that the use of contraceptives is also initiated earlier on when compared to older generations – 24,1 years old for men and 23,4 years old for women (INE, 2001). Usually these figures are mentioned when the issue of sex education is being debated.

There are free contraceptives and free teenage sexual health medical appointments in public health centres. However, a study published by the National Consumer/s Rights Agency (Deco), in May 2007, revealed that only 57% of health centres provided a teenage medical check up and that 40% of young people would be refused medical check ups based on the fact that they were trying to access a Health Centre which was outside their residential area.<sup>88</sup>

### **3.6.7. Is there policy/ public debate around delayed motherhood?**

In 1981 the fertility rate of women over 40 years old was 7.4 per thousand. In 1994 that rate decreased to 2.8 per thousand (the lowest rate since 1981) and it has been increasing ever since. In 2001 the fertility rate of women over 40 was 3.6 per thousand. In 2001, 2.3% of all newborns had mothers over 40 years old. Delayed motherhood is not a widely

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<sup>86</sup> Available at <http://www.acores.com/a/gravidez.html> [accessed 01/06/2008].

<sup>87</sup> Interestingly enough, the values for men remain very similar: 17,3 was the average age for the 1st sexual experience for men of the age group 50-54, and 17,4 was the average age for men of the age group 20-24 (INE, 2002a).

<sup>88</sup> Published in *Jornal de Noticias*, 29/05/2007.

debated issue, but it is starting to be addressed especially by the media. Usually it is framed as a consequence of women's choices concerning career and education.

In law, the only age ceiling regarding parenthood is in the Adoption Law (Law N. 31/2003), by which one cannot adopt after 60 years old, with the exception of adopting a spouse's son or daughter.

According to official statistical data, in 2003 2899 women over 40 years old gave birth. Among these, 697 were mothers for the first time. This number was greater than the number of women who had a child when they were 20 years old (2794). Also in 2003, there were 3 women in Portugal who decided to have their first child after turning 50 years old, and another women had her second child at 51.<sup>89</sup>

According to data provided by the state TV channel RTP (February 2007), in 2004 22% of women over 40 years old giving birth in the Maternity Alfredo da Costa (one of the two major maternities in Lisbon) were having their first child. Among women over 45 years old, that percentage increased to 29%.

In 2008, the online journal *In Vivo* published a thematic issue focusing on the topic of delayed motherhood, with some doctors questioning women's right to have a child after turning 40, due to the risks involved for the foetus. Medical doctor Joe Gomes Ermida, for instance, writes that the ideal age for motherhood is 25-30, and that he regrets the fact that foetus of women who decide to have a child after 40 cannot be heard concerning that decision.<sup>90</sup>

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<sup>89</sup> Available at: <http://www.acores.com/a/gravidez.html>. [accessed 13/05/2008].

<sup>90</sup> Available at: In Vivo, n. 13, <http://www.in-vivo.pt/noticia.asp?id=104> [accessed 28/07/2008].

### **3.6.8. Is there any policy/ legislation defining an ‘appropriate’ age for motherhood?**

The assisted conception law, approved in 2006, does not state an age limit for accessing assisted conception techniques. However, according to the President of the Portuguese Society of Reproductive Medicine, there are state agencies which will refuse women after 42 years old or even 38 years old.<sup>91</sup> This is justified by the reduction in success rates as women are older.

### **3.6.9. How is adoption and fostering regulated? (by the state or private agencies?)**

After 1998 (Decree n. 120/98, 8 May) specific NGOs (called private institutions of social solidarity) can be partners of the Social Security system in dealing with adoption procedures. However they always need to report to the Social Security, who then needs to link with the Public Ministry (state entity).

In February 2005 permission was granted to two foreigner private adoption agencies to operate in Portugal – DanAdopt (from Denmark) and Bras Kind (from Switzerland). This authorisation took professionals in the field of adoption by surprise.<sup>92</sup>

### **3.6.10. Who can adopt (married couples, single women/ men, cohabiting couples, same-sex couples)?**

Married and cohabiting couples have been allowed to adopt, but only different-sex couples. Different-sex cohabiting couples can adopt since 1999 (article 3-e, Law N. 135/99, again repeated in 2001, Law N. 7/2001). Married couples need to be married for more than four years (article 1979, Law N. 31/2003). The law does not specify a period of time of the relationship for cohabiting couples. However the de facto union law (law

<sup>91</sup> As reported by *Correio da Manhã*, 21/01/2007.

<sup>92</sup> As published in *Diario de Noticias*, 12/02/2005: “Portugal legaliza agências internacionais de adopção”, [http://dn.sapo.pt/2005/02/12/sociedade/portugal\\_legaliza\\_agencias\\_internaci.html](http://dn.sapo.pt/2005/02/12/sociedade/portugal_legaliza_agencias_internaci.html) [accessed 13/05/2008].

7/2001) does specify a period of 2 years of “living in de facto union” before granting any legal recognition. [plea]

Single people can adopt as well, which has been regarded by LGBT organisations as a window of opportunity for same-sex adoption, despite being an indirect one.

There are different minimum and maximum age limits for people wanting to adopt. Married or cohabiting couples can adopt as long as both parties are over 25 years old. People can adopt as individuals as long as they are over 30, unless the adoptee is the son/daughter of the person’s spouse. No one can adopt after 60 years old and after being 50 years old (i.e., from 50 to 60) the age difference regarding the adoptee cannot be higher than 50 years. Again, this age limit does not apply when the adoptee is the son/daughter of the person’s spouse.

### **3.6.11. Is there adoption leave?**

Yes. The adoption leave consists of 100 days (plus 30 days for each additional adoptee, in case of multiple adoption) and it is granted to the parent where the adopted child is a minor of 15 years old and as long as s/he has been adopted in the previous 100 days or so. The parent will receive 100% of his/her salary. If the adoption was by a couple, and not individually, this leave of 100 days may be shared between the two adoptive parents.

### **3.6.12. Does the state provide access to assisted conception (donor insemination, IVF etc)? If so, for whom (married couples, single women, cohabiting heterosexual couples, lesbian couples)?**

The Assisted Conception Law was approved in the Portuguese Parliament in July 2006 (Law N. 32/2006). This law has the particularity of including exclusively married women or women who live in a different-sex de facto union for over two years. Therefore these women get to be the sole beneficiaries of assisted conception techniques such as in vitro

fertilisation, artificial insemination, etc. Because of the limitations of the Family Law, which considers legally inexistent the marriage between two same sex people (article 1628 of the Civil Code), this assisted conception law therefore directly excludes lesbians from having access to maternity through these techniques, unless they are bisexual married women or lesbians in (fake) heterosexual marriages. The same applies to single women, regardless of their sexual orientation.

During the parliamentary debate before this law was approved, a left-wing MP from the Left Block raised this issue, accusing the state of perpetuating discrimination. The response of the Socialist Party (the Government Party) focused on the cost involved in these techniques, which then required that the Government would give priority to certain cases over others, in order to reduce costs and make it possible at least for some. Therefore, this is a striking example of how the law enshrines a specific family arrangement as more worthy or proper than others. In this case, paired heterosexuality takes precedence over same-sex de facto unions or the single life.

The minimum age for accessing assisted conception techniques is 18 years old.

### **3.6.13. Is there legal regulation of private provision of assisted conception? If so, what is the nature of the regulation?**

The law on assisted conception establishes the creation of the National Council for Assisted Conception, to which private health institutions must report annually. Furthermore, the same law establishes that assisted conception techniques may be provided both by public and private entities, as long as they are specifically authorised to do so by the Ministry of Health. Finally, it states that anyone providing access to assisted conception techniques outside the authorised health centres will be punished up to three years in prison (article 34).



### 3.6.14. What is the law concerning surrogacy?

Surrogacy is not a widely debated issue in Portugal. The assisted conception law (Law N. 32/2006, 26 July) is clear about what it calls “motherhood of replacement”. In article 8 one reads “Any juridical agreement, either pro bono or paid, concerning motherhood of replacement is considered null”. Later on it says “The woman who undergoes a motherhood of replacement for someone else is held, in the eyes of the law, to be the mother of the child who will be born”.

Not only are surrogacy contracts considered null, but those who promote or celebrate “contracts of motherhood of replacement” can be punished with prison up to 2 years (article 39).

According to media reports, there are on average ten Portuguese each year travelling to USA to get a surrogate mother for their child.<sup>93</sup>

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<sup>93</sup> According to *Diário de Notícias*, 29/07/2006.

### **3.7. *Homosexuality and Anti-Discrimination Legislation***

#### **3.7.1. Is there law against discrimination on the grounds of sexuality/ against lesbians and gay men?**

There is not a specific law against discrimination based on sexual orientation or gender identity. However, the most relevant juridical document – the Constitution – prohibits discrimination based on sexual orientation. This was included in a constitutional revision in 2004, and places sexual orientation among the grounds for prohibiting discrimination, alongside origin, gender, race, language, place of birth, religion, political or ideological beliefs, educational level, economic situation and social status.

Portugal became the 1<sup>st</sup> European country to prohibit discrimination based on sexual orientation in its Constitution and the 4<sup>th</sup> worldwide (only Ecuador, Fiji and South Africa had done it before).

#### **3.7.2. What is the history of the legislation, and its provisions? (e.g. does it relate to employment, the provision of goods and services etc?)**

Although there is no anti-discrimination law on the grounds of LGBT issues, there are several pieces of legislation that directly prevent (at least in theory) discrimination based on sexual orientation.<sup>94</sup>

In 2001 a law on de fact union, including same sex relationships, was approved and it had impacts over the taxation regime, protection of the “family house” and welfare benefits for the surviving partner.

In 2003 the new Labour Code was approved and it also included important changes for LGBT people. First, by addressing sexual orientation in a specific law concerning work, it offered protection in one key area of LGBT discrimination in Portugal – employment.

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<sup>94</sup> For an analysis of this topic, see for example Santos, 2004 and 2008.

Then, it changed the procedure concerning pressing charges against an employer accused of discrimination based on sexual orientation. More specifically, after 2003 it is the employer who needs to prove s/he was not discriminating the employee, instead of the employee having to prove that s/he had been discriminated against.

In 2004, among the revisions included in the Constitution was the prohibition to discriminate based on sexual orientation. The inclusion of sexual orientation among the constitutional grounds for prohibiting discrimination puts Portugal in the front run of Europe and in the fourth place worldwide, being only preceded by Ecuador, Fiji and South Africa.

Finally, in the recently revised Penal Code (September 2007), hate crimes based on sexual orientation were included among the particularly aggravating grounds in case of murder, alongside hatred based on race, religion, politics, ethnic or national origin, or gender (*sexo*) (article 132). It also criminalizes any promotion of discrimination based on sexual orientation (article 240).

### **3.7.3. Is there recognition of the problem of anti-gay violence/ hate crimes? Are there policy initiatives to combat it?**

There are several reported cases of homophobic and transphobic violence, including death threats and beating of gay men in public toilets in the Northern rural city Viseu, in 2005. Furthermore these attacks were politically legitimised by the city Mayor who asked for the authority's intervention in order to prevent homosexual encounters in public toilets in the city. This request is at odds with article 13 of the Constitution, which forbids discrimination based on sexual orientation, and it is not supported by any other law, as homosexuality and prostitution are not considered crimes according to the Portuguese Penal Code. The Mayor, later on, joined the "Stop-homophobia" demonstration in Viseu, organised by the LGBT movement in May 2005.

In February 2006 Gisberta, a transgender woman, was repeatedly raped and beaten, thrown into a well and left to die. The aggressors were a group of teenage boys and the court sentence, on the 1st August 2006, stated Gisberta died not from injuries but because she had drowned in the well's water. This case stirred international support and the transgender movement achieved for the first time some visibility concerning discrimination and specific measures required to combat it.

In the recently revised Penal Code (September 2007), hate crimes based on sexual orientation were included among the particularly aggravating grounds in case of murder, alongside hatred based on race, religion, politics, ethnic or national origin, or gender (*sexo*) (Article 132, n. f).

### **3.8. Immigration and Intimate Relationships**

#### **3.8.1. Is there a right to “family reunion”?**

There is the right to family reunion. The law identifies the categories of people who are considered “members of family” entitled to family reunion status. These include the spouse or partner, children (biological or adopted), parents (when they are financially dependent), brothers or sisters (when they are minors and depend on the person with the resident status) and also children over 18 *as long as they are single* and are studying in a Portuguese school or university.<sup>95</sup>

#### **3.8.2. What is the law/ policy about immigration for the purposes of marriage?**

In July 2007 a new Law of the Foreigners (Law N. 23/2007, 4 July) came into force. Among other changes, this law made it illegal to be married simply for purposes of acquiring citizenship and a permanent visa attached to it. These fake marriages were called “white marriages” by the police, which seems to indicate a certain conception of ‘the Portuguese’ as white people and ‘the rest’ or ‘immigrants’ as non-white. From June 2007 these “white marriages” are being investigated and will be punished with eviction from the country.<sup>96</sup> Despite the fact that it is estimated that there are around 200 fake marriages every year (according to *Público*, 16/04/2007), there are no records of any court deciding on nullification.

#### **3.8.3. Do unmarried and same-sex couples have the right for the non-national partner to immigrate?**

Family reunion can be granted to the partner of the person with the resident status, as long as the de facto union is proven to be in accordance with the de facto union law

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<sup>95</sup> Source: <http://www.sef.pt/>. [accessed 12/04/2008]

<sup>96</sup> According to *Público*, 16/04/2007.

(living in a de facto union for more than 2 years, both partners being over 16 yrs old and having no direct kinship in relation to one another, etc.).

The law also establishes that children – including adopted children of the resident person's partner – can access the family reunion right.<sup>97</sup>

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<sup>97</sup> Source: <http://www.sef.pt/> [accessed 12/04/2008]

### **3.9. Single People and Solo Living**

#### **3.9.1. Is there any public/ policy debate about the rise in solo living?**

This is not a much debated issue in Portugal. The only occasion on which it was discussed was after the 2001 Census, with some comments about the rise in solo living, usually to highlight the impact of individualisation over family models.

According to official statistics from the Census, there was a rise in solo living (referred to as “people living alone”) of 44.1% between 1991 and 2001. In 2001 “people living alone” represent 5.5% of all resident population (3.7% of women and 1.8% of men).

#### **3.9.2. Is there any social/ public housing provision for single people?**

No. Marital status is not a criteria used in the attribution of social housing.

<b>Comment</b>
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According to the Census 2001, 37.5% of the people residing in Portugal were single.
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One of the very few laws that may be thought of as to apply to single people is the shared economy law [*lei de economia comum*], Law N. 6/2001, designed to protect the “situation of people living in shared table and house for over 2 years and that have established a living experience together [*vivência em comum*] of reciprocal help and share of resources”.

The reason why this law was first debated in the Parliament was to provide an alternative to the LGBT claim of a de facto union law which included same-sex couples. One year before, in 2000, after a lot of controversy, a de facto union law had been approved for different-sex couples only, which generated extensive protest on the part of the LGBT movement. The government’s suggestion was to create another law – shared economy

law – which would apply to several situations, including same-sex couples, but also sisters or brothers or friends sharing resources together. Faced with that possibility, the LGBT movement mobilised and organised the first kiss-in ever in Portugal in 2000, in front of a civil registration office, with banners saying “This is not a shared economy”.<sup>98</sup> This event obtained wide media coverage and put pressure upon the MPs to introduce an inclusive de facto union law. As a result, two laws were approved in the same day (15 March 2001) – an inclusive de facto union law and the shared economy law.

This law includes the possibility of more than two people living in shared economies and it guarantees some of the rights included in the de facto union law, namely the juridical regime of holidays, bank holidays and absences, the tax regime which applies to married people and protection of the common house.

Another example would be the previously mentioned revision of the Penal Code, in 2007, which establishes the equivalence between married people and non-married people, *even when they are not cohabiting*, for the purposes of punishing domestic violence (article 152).<sup>99</sup>

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<sup>98</sup> This kiss-in took place on the 6 February 2000, in front of the 6<sup>th</sup> Civil Registration Office, in Lisbon.

<sup>99</sup> Source: *Diario da Republica*, n. 170, 04/09/2007.



### **3.10. (Trans)gender Recognition**

#### **3.10.1. What is the legal situation regarding trans people? Is there provision to register a person's "new gender", for instance, by changing birth certificates and passports? What is required (i.e. surgery?) to achieve recognition of "new gender"?**

Until 1995 the Deontological Code of the Medical College prohibited sex reassignment surgeries. It was the National Executive Council of that College which stopped this ban, in a resolution dating the 19<sup>th</sup> May 1995. The required criteria include to be over 18 years old and not being previously married. To change his/her name the transgender person must go to court in order to achieve recognition of "new gender" (please refer to section 10.5 in this report).

#### **3.10.2. What body/ institution has the authority to deal with transgender issues?**

There is no single institution or body dealing with transgender issues. Instead, there are several bodies which have authority at different stages of the process. The first body is the Medical College, to whom the person must address a formal request in order to obtain his/her surgery. After surgery, in order to change his/her name, the person must address a petition to the Conservator of the Central Registrations, through a Civil Registration Office (articles 104 and 278 of the Civil Registration Code). This is a recent change in the Code, as until September 2007 this petition would have to be addressed to the Ministry of Justice instead.<sup>100</sup> The Conservator of the Civil Registration will then present it to the Minister of Justice (article 280). If the Minister decided the case should be considered, s/he will authorise the petitioner to publish in two different issues of one of the most read newspapers of his/her place of residence an advert summing up the request and inviting any person to present to the Central Registrations Office eventual arguments against the petition in the next twenty days. The Minister of Justice can excuse the petitioner from publishing this advert (article 281). In case the advert is published, after

<sup>100</sup> Change in the Civil Registration Code published in *Diário da República*, 1<sup>st</sup> series, n. 188, 28/09/2007.

those twenty days, any arguments against the petition are sent to the Ministry of Justice, together with a statement of the Conservator of the Central Registration Office concerning that petition (article 282). If the petition is rejected, the petitioner can appeal to the Higher Court of Justice (article 282).<sup>101</sup>

### **3.10.3. Is there anti-discrimination legislation regarding transgender people?**

No, transgender people are never mentioned in Portuguese laws.

### **3.10.4. Does the health service provide gender reassignment surgery? Is it free? How is it accessed?**

The process is long, including several doctors' authorizations and a two-year period on hormones before the surgery is done. The process starts with an appointment with a multidisciplinary team of doctors and psychologists in order to make a psychological assessment of the candidate. This assessment is run in one of two public hospitals (Hospital Júlio de Matos or Hospital de Santa Maria), both of them in Lisbon. After this assessment is successfully complete, the candidate starts his/her hormonal treatment for a period of 2 years (at least). After that, each one of the doctors in the multidisciplinary team will draft a medical report. Those reports must then be included by the candidate in his/her formal request to the president of the Medical College in order to ask for authorization to proceed with the surgery. This request is not common in other countries where gender reassignment surgery is provided, and therefore it is being contested by ILGA Portugal. Then, all these documents (medical reports and candidate's request) are analysed by a commission, which then has the power to authorise or refuse the request. In case it does authorise, surgeries are exclusively came out in Lisbon, at the Hospital de Santa Maria.

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<sup>101</sup> The only case which was rejected after appeal by the Higher Court of Justice regarded a person who was not considered to be transgender because s/he had children. Info available, in Portuguese, at <http://www.ilga-portugal.oninet.pt/glb/gip/transexualidade.htm#LEGIS>. [accessed 15/02/2008].

Surgeries concerning breasts (mastectomy or enlargement) and genitals are paid for by the National Health System, which, however, does not pay other aesthetic procedures, like hair or Adam's apple removal. The transgender community has several claims in this respect, some of which relate with a call for a Gender Recognition Law and freedom from compulsory psychiatric dependency.

### **3.10.5. Is there a law regulating the act of naming? To what extent are names gendered? Are there restrictions to the names accessible to transgender people based on gender?**

Names are very rarely gender-neutral in Portugal and, in fact, it is stated in the Civil Registration Codes that names should not raise any doubts concerning the gender of the person (according to article 103, n. 2a of the Civil Registration Code; more on this in the Case Study section, later on this report).

The Civil Registration Code includes the possibility of changing one's name (articles 104 and 278). In order to do that, one must hand in a request, at a Civil Register Office, which will then be decided by the Minister of Justice. However, there is nothing in the law authorising or rejecting the possibility of changing one's gender on the birth certificate. Therefore, each case is treated as a first case in which the person asks the court for a ruling for his/her particular case.

Up to 1981, this was dealt with by courts as if there had been a mistake in the birth certificate. But in 1981 the Court of Appeal of Évora ruled against this (31/01/1981), stating the correctness of the information contained by the birth certificate. So, after 1981 the usual procedure for transgender people is to present their case in Court, challenging the Portuguese state to recognise that this person has a gender which is different from the one stated in his/her birth certificate and therefore demanding it to be changed according to the present situation. With one exception (Court of Appeal of Lisbon, 10/06/1986),

court's decisions have been favourable as long as the following criteria are met: a) the candidate must be over 18, b) cannot be able to procreate, c) must have been through irreversible sex reassignment surgery, d) must have lived in the social role of the transitioned gender, and e) must not have any children.

Regarding non-operated transgender persons or those who have children, the only possibility is requesting to change their name into one of the few gender neutral names which are included in the Onomastic Index e.g., Jo or Zara).

### **3.11. Care**

#### **3.11.1. Is there any policy/ public debate about care, particularly the “care deficit”?**

There are some scattered discussions on care, specially related with the elderly, but it is not a much debated issue. The big policy concern in this respect is around work-family balance.

#### **3.11.2. What rights, if any, do people have for (paid or unpaid) leave from work to care for children, partners, family members/ elderly parents, friends?**

The former allowance for care or assistance by a third party was renamed in 1999 as a supplement for dependency (Decree 265/99, 14 July). There are two types of benefit included in this law. One concerns pensioners who are dependent on a third party on a daily basis. Claimants get up to 50% of the value of the social non-contributory pension (on top of their pension). The other benefit concerns pensioners who are not only dependent but also confined to bed and/or with severe mental problems, which entitles pensioners up to 80% of the social pension (on top of their pension). Application for this benefit, can be either by the pensioner or by his/her family members or institutions who provide them with support (article 16).

Regarding tax relief, health care expenses can be deducted for people caring for elderly family members, provided that the carer does not earn more than the minimum wage. Concerning leave from work, Law N. 4/84, 5 April, in its article 23 (“Other situations of support to family”) established that a worker is entitled up to 15 days each year in order to care for his/her spouse, parents, children over 10 and other members in direct kinship.<sup>102</sup>

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<sup>102</sup> Leave from work in order to care for family members is dealt with in Law N. 4/84, 17/95, 102/97 and 18/98.

In order to care for children under 10 (either biological children, adopted or stepchildren), each parent is entitled up to 30 days each year, but this leave cannot be taken simultaneously by both parents. When one of the parents does not work, the working parent cannot enjoy the leave unless the co-parent is unable to care for the child.<sup>103</sup> For more on caring for children, please refer to point 6.1.3 in this report.

There is also leave granted to grandparents, where they have grandchildren born to their son or daughter whilst they were under 16 years old. Also, the grandchild must be living with the employee and the employee's spouse must either be working, physically or psychologically unable to take care of the grandchild or be absent. It consists of 30 days leave to be enjoyed immediately after the grandchild is born and the employee will earn 100% of his/her salary. If both grandparents are working this leave can be enjoyed by one of them in full or by both part time, at the same time or not, depending on their decision.

There is no provision regarding caring for friends, except for the law referring to people living under the shared economy law (Law N. 6/2001). A shared economy is defined as “the situation of people living in a shared table and house (sic) for over two years and who have established a shared life of reciprocal support or share of resources. This applies to unities constituted of two or more people, as long as at least one of them is over the age of majority”. Therefore this law may include friends living together with no sexual attachment to one another.

Friends under the shared economy law can benefit from the juridical regime of holidays, absences and leaves which also applies to spouses. They are also entitled to stay in the house they have lived for over 2 years, in case the owner dies, for a period up to 5 years and they are the main potential buyers of that house, unless the owner had direct relatives who lived with him/her for over a year or prove they have absolute need for the house (Law N. 6/2001, article 5). Moreover, in case of death, the surviving part of a shared economy is entitled to 5 days of absence (article 227 of the Labour Code). They can also submit a joint tax return (articles 14, 59 and 69 of the IRS Code).

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<sup>103</sup> According to Law N. 4/84 (article 15), Decree N. 70/2000 and Decree N. 230/2000 (article 11).

### **3.12. Tissue and Organ Donation**

#### **3.12.1. Are there restrictions on who can donate bodily tissue and organs to whom? (i.e. family members)**

Portuguese legislation has the assumption of donation, which means anyone – both national and foreigner citizens living in Portugal – is considered a potential post-mortem donor after the moment s/he is born (Law N. 12/93, 22 April). If the person does not want to become a potential donor, then s/he must fill in specific forms and hand them over to the National Register of Non Donors (this can be done by legal tutors / parents in case of minors of age).

But in order to become a living donor of organs for many years Portuguese law determined that there must be up to a third degree of kinship between the donor and the receiver (Law N. 12/93, 22 April). There was one exception to this, which concerned donating bone tissue. Because bone tissue is not regard as organ transplant, there were no restrictions in terms of kinship. There is a growing data base of voluntary bone tissue donors.<sup>104</sup>

After discussion in Parliament on the 29 April 2006, Law N. 12/93 was replaced by Law 22/2007, which includes the EU Directive 2004/23/CE, concerning tissue donation in the national juridical system. One of the main innovations of this new law is that it allows friends to be tissue donors, hence revoking the third degree of kinship rule.

So today, anyone can be a donor in Portugal, alive or post-mortem. Before this new law Portugal had 19 donors per million inhabitants; the expectations are that with this law Portugal will reach 35 donors per million.<sup>105</sup>

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<sup>104</sup> Source: Ministry of Health (<http://www.min-saude.pt/portal/conteudos/informacoes+uteis/doacao+de+orgaos+e+transplantes/default.htm>). More on this database in <http://www.chsul.pt/> [accessed 03/03/2008].

<sup>105</sup> *Diario de Noticias*, 30/06/2007, “Dádiva de órgãos em vida é alargada a casais e amigos”, [http://dn.sapo.pt/2007/06/30/sociedade/dadiva\\_orgaos\\_vida\\_e\\_alargada\\_a\\_casa.html](http://dn.sapo.pt/2007/06/30/sociedade/dadiva_orgaos_vida_e_alargada_a_casa.html) [accessed 03/03/2008].

### **3.13. *Other issues in social policies & intimate citizenship***

#### **3.13.1. Sexual harassment**

The new Labour Code, approved in 2003<sup>106</sup>, expanded the notion of harassment. Thus, harassment is considered as discrimination, and it is defined as any unwanted sexual behaviour (either verbal, non verbal or physical) aiming at or resulting in impacting over individual dignity or creating a frightening, hostile, humiliating or unsettling environment.

#### **3.13.2. Friends as family**

Unlike what happens in Bulgaria, for instance, where friendship is identified as bases for the creation of relationships in the family, in Portugal there is no official definition concerning the main functions of family. However scarce, friendship is nevertheless mentioned in the Family Law, where the words “friend” or “friendship” can be found twice. When mentioned, friendship refers to the possibility of the court appointing a friend to become the guardian of a child or a member of the family council.

According to the law, a child must have a guardian when his/her parents have died, are unknown or were prevented from parental powers (article 1915 of the Civil Code defines the grounds for this prevention; article 1921 defines in which cases a child must be appointed a guardian). In cases where the parents fail to appoint the guardian, it is up to the court to decide. The court will appoint the child’s guardian among “the relatives or so of the minor or among the people who actually have cared or are caring for the minor or who have shown affection towards him [sic]” (article 1931 of the Civil Code).

Besides the guardian, the court must also appoint a “family council” whose task is to assess the guardian’s performance regarding the child’s best interest. The members of

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<sup>106</sup> Law n. 99/2003, 27 August.



this family council are chosen among the “relatives or so of the minor, bearing in mind the kinship proximity, relationships of friendship, abilities, age, place of residence and the demonstrated interest on the minor. In case of absence of relatives or so [...], the court will chose among the parents’ friends, neighbours or people who may be interested in the minor. Whenever possible, one of the members of the family council will represent the father’s line and the other the mother’s line” (article 1952 of the Civil Code”).

### **3.13.3. Sexist or heterosexist language in law and policy**

The masculine universal is the most common feature of policy and legal documents in Portugal. Because most words are gendered, nouns such as “citizens”, “parents” or guardian are not gender neutral and they are always used in its male version.

During the dictatorship there were more examples which were then removed such as the figure of the “family chief” or head of the family, which was to be exerted by the man. But interestingly enough there is something quite similar which remains up to this day in the family law included in the Civil Code. When describing the rights and duties of the guardian of a minor, it is written that the guardian should “play his role with the diligence of a good family father” (i.e., good father figure) (article 1935 of the Civil Code, dating from Law-Decree n. 496/77, 25 November).

Another example is the definition of infanticide, which regards exclusively the mother: “the mother that kills her son [sic] during or immediately after giving birth, while being under its disturbing influence, is punished with a prison sentence of 1 to 5 years” (article 136 of the Penal Code).

### **3.13.4. Shared housing**

According to the 2001 Census, there are 8178 houses occupied by more than one classic family.

In 2005 Karin Wall edited a book about families in Portugal. In one of the chapters, the topic is “domestic groups in co-residence”, i.e. a group of people that live in the same house and who may or may not share the available resources (Wall, 2005: 553). In Wall’s study she considers what she calls “complex families” (married couples living with other relatives) as opposed to “simple families”. Most families in Portugal are simple families, that is, they do not live with other people in co-residence. However, one in every 3 (37%) live or have lived at some point in complex families (2005: 594). The main reason identified by respondents when accounting for the fact that their living arrangements were in complex families concerns receiving support – 61,2% did it because they had no house of their own when they got married, for instance. Other reasons identified are related to giving support (16,4%) and family circumstances (8,1%), such as the habit of always living together with other relatives (4,6%), the fact that the family had a big enough house (1,4%) or the wish to inherit the family home (0,9%). There was a small group of people who justify it based on their choice of living with other relatives (0,2%). The majority of participants said they shared both spaces and resources with other members of their domestic group (85,1%). Complex families seem to be related to issues of class and social status – it is more common among working class (mainly farmers and factory workers) than among middle class people (2005: 584-585).

**Source:** Wall, K. (Ed). 2005. *Famílias em Portugal*. Lisboa: Imprensa Ciências Sociais.

### 3.13.5. Relevant definitions in the Census 2001

- Married with registration or by law

Situation of an individual married by law and who lives in marriage-like situation with his/her opposite-sex spouse.

- Married without registration or de facto

Situation of the individual who, despite his/her legal marital status, lives with an opposite-sex person, in a situation similar to marriage, but without civil registration.

- Classic family

Group of individuals who live in the same house and share relationships of kinship (by law or de facto) amongst themselves, inhabiting all or part of the house. We also consider as classic family any independent person who inhabits part or all of a house. Domestic workers who live in the house where they work are integrated in the family, as long as they don't visit their family home residence every week or almost every week.

Individuals who have no kinship relationships to one another can also be included in this definition of classic family as long as they share the same house, food or income.

[Comment: This is highly subjective: in some cases two friends will be considered as one family of two people; in other cases the same two friends would be considered as two families of one person each.]

- Institutional family

Group of individuals living in a collective house who, regardless of kinship relationships amongst themselves, are bounded by a common discipline, benefit from the aims of an institution and are ruled by an internal or external body/entity.

- Place of birth

Place of residence of the mother, when the person was born.

- Family nucleus

Group of individuals within a classic family among whom one of the following relations will apply: couple by law or de facto with or without unmarried children, father or mother with unmarried grandchildren, grandparents with unmarried children and a grandparent with one or more unmarried children.

- Reconstituted family nucleus

Nucleus which consists of a couple by law or de facto, with children, in which at least one of them is the biological or adopted son [sic] of only one of the members of the

couple.

- Shared housing (“Shared occupation of a house”)

Situation that occurs when the family house is occupied, as residence, by more than one classic family.

- Lone parent family<sup>107</sup>

A group of people within a private household with only one parent, the mother or father, with one or more unmarried children or only one grandparent, the grandmother or grandfather, with one or more unmarried grandchildren.

- Legal separation

Change in the family life of spouses by legal decision in which the obligation of cohabitation and assistance ceases, though the couple remains married.

- Divorce

The marital status of any person whose marriage has been definitively dissolved by law.

- Affinity

Ties binding each spouse to the other relatives (e.g. brothers-in-law).

- Marriage

The contract entered into by two persons of the opposite sex who intend to found a family in partnership and cohabitation.

- Permanent immigrant

A person (national or foreign) who, in a certain period of reference, entered the country with the intention of remaining here for one year or more, having previously resided abroad continuously for one year or more.

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<sup>107</sup> The following definitions can be found at <http://metaweb.ine.pt/sim/conceitos/conceitos.aspx?ID=EN>

- Temporary immigrant

A person (national or foreign) who, in a certain period of reference, entered the country with the intention of remaining here for less than one year, having previously resided abroad continuously for one year or more.

- Degree of relationship (*parentesco*)

A tie binding two people by consanguinity, adoption or affinity, spouses with each other and their families to the fourth degree.

**Comment**

Some of these definitions highlight the emphasis placed in living together or sharing house when defining what marriage or family is. In fact, as pointed out previously, cohabitation is one of the five marital duties. Therefore LAT relationships collide with the dominant legal, political and social understanding of marriage.

### **3.14. Portugal Appendices**

#### **3.14.1. The (obsessive) search of the father<sup>108</sup>**

Portuguese family law seems to be deeply anchored in biological links when it comes to parenthood, much more than in social ties. Examples of children of ‘unknown father’ make this point clear.

Until 1977, the law made a distinction between children who were born on the wedlock and those who were called illegitimate or bastard children. Then, in 1977 the law changed abolishing that distinction and establishing the primacy of biological parenthood instead of social parenthood. After this time, it is mandatory that every children gets an identity document in which the name of the father and the name of the mother are included (both). This was allegedly intended to protect both the interests of the child (thus avoiding situations in which the child could be stigmatised for the lack of his/her father’s name in his/her ID documents, as it used to happen in the past) and of the woman, who is thus considered to be a victim in need of protection under the law. This example seems to indicate a rather patriarchal, heteronormative and patronising stance of Portuguese law, which thus disregards the possibility of a woman choosing not to include a man’s name in her child’s certificate simply because she had that child either as an individual project (rather than in couple one) or in a lesbian relationship.

In cases in which the father is unknown – either because the woman does not know or refuses to tell – the state initiates an informal fatherhood investigation<sup>109</sup>. The procedure initiated by the Public Prosecutor includes inquiring of the mother and other witnesses, paternity tests, reports of social workers and the police about the social, economic and moral (!) situation of the mother, and court hearings. After the court hearing, the case is considered either viable or non-viable. If it is considered viable by the court, the investigation continues under a different category: fatherhood investigation procedure<sup>110</sup>.

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<sup>108</sup> For more on this topic, see for example Costa 2008a and 2008b.

<sup>109</sup> In Portuguese: “Averiguação Oficiosa de Paternidade”.

<sup>110</sup> In Portuguese: “Acção de Investigação de Paternidade”.

According to official data<sup>111</sup>, there are 9481 children born between 1996 and 2004 who did not know who their biological father was. After the informal fatherhood investigation taking place, there are still 9 in every 1000 children whose biological father will remain unknown. There are still no official data about the number of unknown fathers after the second procedure – fatherhood investigation procedure, which starts only after the court hearing – taking place.

Between 1996 and 2004 the number of informal fatherhood investigations decreased from 8000 to 4000, which may indicate a decrease either in the number of unknown fathers or in the official obsession with ‘the father’, or the malfunctioning of the Portuguese judicial system. Moreover, 50% of these fatherhood investigations are still waiting to be solved.

The underpinnings of this compulsory fatherhood investigation is that both children and women need to be legitimised by the name of a man – the father – who must then be identified, recognised and made responsible under the eyes of the law and society.

### **3.14.2. What’s in a name? The politics of naming and gender in Portugal**

In Portugal there are specific rules which apply when planning to name a newly born child or to change one’s name (e.g. as a transgender person). These rules are published in the Civil Registration Code, under the Ministry of Justice. Every name must be recognized under the Onomastic Index and chosen names cannot raise doubts concerning the gender of the person (Civil Registration Code, article 103, No 2a). Two brothers or sisters cannot have exactly the same name, unless one of them had already died. There are also rules which apply to surnames.

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<sup>111</sup> Data of the Procuradoria Geral da República, used by Susana Costa in a seminar at the Centre for Social Studies, Coimbra, on the 21/03/2006. More information on this was also published in *Diário de Coimbra*, 03/09/2006.

- Newly born children

The full name can contain up to six nouns, including two names and four surnames. In cases in which the name is not included in the Onomastic Index, parents are allowed to dispute their right to name the child as they please, by challenging the state through a petition. There is an online list of names which were either accepted or rejected after petitions in 2006. Among the rejected names are foreign names like Charlie, Charlotte or Sasha and also names which might raise controversy such as Salazar (Portuguese former dictator) or are seen as too Hollywood-like, such as Ben-Hur. According to information provided by a Civil Registration Conservatory officer in Lisbon, in August 2008, it is the juridical advisor hired by the Central Registration Conservatory who analyses each request, investigates and then decides. The same source also said she did not know of any particular document containing specific criteria concerning names, except for the Onomastic Index. This reinforces the suspicion that the decision is ultimately based on discretionary decisions of individual people.

- Transgender people

The Civil Registration Code includes the possibility for any person to change his/her name (article 104). Article 278 states that in order to change his/her name, one needs to fill in a petition, sign it and send it to the Minister of Justice, requesting permission to change his/her name. In the case of transgender people, so far all of them had to take the Portuguese state to court in order to obtain a favourable sentence which allowed them to change their name. The idea is to obtain from the state the recognition that the trans person does have a gender which is at odds with the one ascribed to her/him when she/he was born.

There are two different situations. When certain criteria are met – namely when the trans person does not have any children, has been through sex reassignment surgery, is over 18, has been living in the new social role for at least 1 year, the changes are irreversible and she/he cannot procreate anymore – all court decision have been positive so far,



except for the decision of Lisbon Court (Tribunal da Relação de Lisboa) in 10/06/1986.

When not all of these criteria are met – namely when the trans person has children and/or did not have sex reassignment surgery –, all they can do is to apply for a change of his/her name into one of the very few neutral names which are included in the Onomastic Index, such as Jo and Zara.

- Spouses

Each spouse, legally married, may add to his/her surnames up to two of his/her spouse's surnames, except when he/she is keeping the surnames of a former spouse (according to Family Law in the Civil Code, article 1677, dating from 1978).

In case of death of one of the spouses or judicial separation or divorce, the court may prevent the other or surviving spouse from using his/her spouse's surnames, when it is considered to “seriously harm the moral interests of the other spouse of his/her family”. The people entitled to request a “deprivation of the use of the name” are “the other spouse or ex-spouse, or, in case of death, his/her descendents, ancestors or brothers [sic] of the deceased spouse” (according to Family Law in the Civil Code, article 1677, dating from 1978).

- Adoption

Article 1988 of Law N. 31/2003 establishes that the adoptee's original family names should be replaced by the ones of the adopter, and that his/her name can also be, exceptionally, changed, provided that this change would be necessary to ensure the wellbeing and integration of the adoptee.

### **3.15. Portuguese glossary on intimate citizenship**

Amante – lover. It is traditionally used in a derogatory sense, to describe people with whom one is having an affair outside the marriage. Because adultery is morally reproachable, particularly female adultery, to say that a particular woman is “the *amante* of a married man” is among the worse categories. Even among the younger generations the term is not used in a positive sense.

Amantizado/a – old expression to describe living in cohabitation. People still know what it means, but it is not commonly used nowadays.

Amigado/a – living in cohabitation; the word derives from “amigo/a” which means friend. People still know what it means, but it is not commonly used nowadays.

Amizade colorida – coloured friendship. It means a friend with whom you share some sexual acts, though none of you consider to be his/her boyfriend/girlfriend or lover. It is an expression exclusively used among younger generations.

Assédio – harassment. Commonly used in policy and legal documents.

Bastardo/a – child out of wedlock. It used to be commonly used during the dictatorship, but after 1976 all children have equal rights, regardless of the marital status of their parents. Therefore it stopped being used, though people still know what it means.

Cama – it means bed, but it is often used as a synonym for having sex.

Casamento – marriage/wedding.

Casamento por conveniência – marriage out of interest.

Companheiro/a – partner. Its usage became more common after the de facto union law was approved, first for heterosexual couples in 2000, and then for everyone regardless of sexual orientation in 2001.

Concubinato – old term designating living in cohabitation. It came from the former colonies, when men used to leave their wives in Portugal and emigrate to Brazil or Africa and then start another family with a local woman, who would then become their “concubine”. In a way it is similar to the word “amante”, but even less used.

Concubino/a – old word for cohabiting partner, especially when the other partner was married; it is also synonym for lover.

Cônjuge – spouse. It is the word used in policy and legal documents.

Enxoval – the bottom drawer. This is a very gendered notion, as traditionally only women will receive gifts, since early childhood, that are meant to be used one day, when they get married. These include towels, bed linen and table linen. This is an old tradition that is still implemented nowadays, particularly in rural areas.

Esposo/a – spouse. It is the word used socially, but increasingly younger generations do not use it. “Marido” and “mulher” are used, instead.

Género – gender. There is some contention among experts in linguistics regarding the words “género” (gender) and “sexo” (sex), as it is sometimes argued “sexo” refers to both and that “género” is a poor translation of the English word which generates confusion, as “género” is also the word used in Portugal for literary genre.

Invertido – invert (homosexual). Many dictionaries used to contain this word when defining what a homosexual was. It is a value-laden word and LGBT organisations have campaigned against it, in some cases (at least) achieving to remove it from dictionaries.

Lua-de-mel – honeymoon. Commonly used.

Marido – husband. Commonly used. The etymology of the word comes from Latin and it means to own a woman and thus it is etymologically linked to property in a clearly gendered way.

Matrimónio – wedding. Commonly used.

Mulher – woman, but also wife. Commonly used.

Namorado/a – boyfriend/girlfriend. Commonly used.

Noivo/a – the two parties before marriage (but only their intentions to get married have been announced).

Noivado – engagement.

Nubentes – it is a word commonly used in Family Law to describe the two parties getting married.

Núpcias – wedding night. Commonly used.

Sexo – sex, often used as a synonym for gender (please refer to “género” above).

## 4. The United Kingdom<sup>112</sup>

Isabel Crowhurst

### 4.1. *Marriage*

#### 4.1.1. What is the legal definition of marriage?

There is no statutory definition of marriage in English law (Diduck and Kaganas 2006). However, the judicial definition that is most commonly referred to is that of Lord Penzance in the 1866 *Hyde v Hyde* case. He stated: “I conceive that marriage, as understood in Christendom, may [...] be defined as the voluntary union for life of one man and one woman to the exclusion of all others” (quoted in Lowe and Douglas 2006: 40). Despite its Victorian heritage, the definition has never been overruled, and its key principles (voluntariness, ‘for life’<sup>113</sup>, heterosexuality and monogamy) are incorporated in the Matrimonial Causes Act (1973) that defines the grounds on which marriage is valid, void or voidable (see below). The same principles (and lack of a statutory definition) apply to both Scotland and Northern Ireland. In Scotland marriage is regulated by the Family Law (Scotland) Act 2006, and in Northern Ireland by the Marriage (Northern Ireland) Order 2003.

#### 4.1.2. At what age can people get married?

For a marriage to be valid both parties must have reached the age of 16. In England, Wales and Northern Ireland (but not Scotland) consent to the marriage must be given when a party to the marriage is 16 or 17 years of age<sup>114</sup> (Standley 2006).

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<sup>112</sup> The United Kingdom contains different legal systems (see Cownie, Bradney and Burton 2007; et alia). This report focuses on the legal system which applies to England and Wales. Wherever relevant, differences in the Scottish and Northern Irish systems will be specified.

<sup>113</sup> As Lowe and Douglas (2007) point out, the use of Christendom in the definition is interpreted as a reference to the fact that marriage must last for life. This, however, does not exclude the possibility that marriage may be dissolved through the act of divorce.

<sup>114</sup> The purpose of this provision is, according to Lowe and Douglas, to prevent “*children* contracting unwise marriage” (2007: 55; emphasis added). Consent may be given by each parent with parental responsibility, and each guardian, or special guardian if there are any (Standley 2006). Interestingly, this

An exception to the rule occurs when a person marries a step-child. In this case both parties must be aged 21 or over (and the step-child must not have been brought up by that person as a step-child at any time before the age of 18, see section 4.1.3) (Standley 2006).

#### **4.1.3. What obstacles are there to marriage? (What can stop people being allowed to marry?)**

The Matrimonial Causes Act (MCA) 1973 states that interested parties have the capacity to marry only when all the following four conditions apply: 1) they are not within the prohibited degrees of relationships; 2) they are both over the age of 16; 3) neither of them is already married; and 4) one of them is female and the other male. More specifically, in relation to:

1) degrees of relationships: marriage between certain relatives related by blood or by marriage (affinity) are prohibited by the MCA 1949. The blood relatives whom one cannot marry are: parent, grandparent, child, grandchild, brother or sister, uncle or aunt, nephew or niece. A person can marry his or her: step-child, step-parent, step-grandparent, or parent-in-law. As mentioned earlier, a person cannot marry a step-child unless both parties are aged 21 or over and the step-child was not at any time before the age of 18 brought up by that person as a step-child. Fewer restrictions apply to a relationship acquired by adoption (it is possible, for example, to marry one's adopted brother or sister) (Diduck and Kaganas 2006; Standley 2006).

2) age restrictions: see section 4.1.2 above.

3) monogamy: according to the law, marriage is a monogamous union. In order to contract a valid marriage, neither party may be already married to, nor be in a civil partnership, with someone else.

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means that an unmarried father cannot give consent unless he has acquired paternal responsibility through official registration (see section 4.6.2).

4) heterosexuality: The marriage is void if the parties are not respectively female and male. Hence, same-sex marriage is not permitted in the UK (although, since 2005 same-sex partners can enter a registered civil partnership, see section 4.5.3). To note that, as a result of the reforms introduced by the Gender Recognition Act 2004, transsexuals can enter into a marriage in their acquired gender (see section 4.10) (Diduck and Kaganas 2006; Standley 2006).

#### **Comment**

Restrictions existed to ‘in-law’ marriage up until 2005. These were removed after the European Court of Human Rights<sup>115</sup> found that the barriers to marriage between a father-in-law and daughter-in-law (case *B and L v United Kingdom*) set out in the Marriage (Prohibited Degrees of Relationship) Act 1986 were in breach of the right to marry stated in the European Convention on Human Rights. With the Marriage Act 1949 (Remedial) Order 2007, the prohibition of marriage between a person and the parent of his/her former spouse and the marriage of a person to the former spouse of his/her child were repealed (Lowe and Douglas 2007; Standley 2006).

#### **Comment**

In January 2008, the media brought the following case to public attention. A court annulled the marriage of a pair of British twins who had been adopted by separate families soon after birth, and later got married without knowing they were brother and sister. The case had been originally raised by a former Liberal Democrat MP, during a House of Lords debate on the Human Fertility and Embryology Bill in December 2007. The MP stated that adopted children should always be given enough information to be able to know the identities of their biological parents and of their siblings (BBC 2008a). According to the BBC, where this piece of news was also reported, child placement organizations now try to place brothers and sisters together, or at least try to ensure that siblings maintain contact with each other. This did not apply 30-40 years ago, hence the

<sup>115</sup> With the passing of the Human Rights Act 1998, the provisions of the European Convention of Human Rights have been incorporated into UK law and can be applied directly by UK courts.

risk for siblings of that generation of finding and getting romantically involved with each other (BBC 2008a).

#### **Comment**

In February 2008, a Labour MP's comment on "inbreeding among immigrants [...] causing a surge in birth defects" sparked heavy criticism amongst other parliamentarians and the public more generally (Rodgers 2008, *The Independent*). The Muslim community was particularly outraged by the MP's claim that while "the practice did not extend to all Muslim communities, [it is] confined mainly to families originating from rural Pakistan" (Gadher, Morgan and Oliver 2008, *Timesonline*). The spokesperson of the Muslim Public Affairs Committee said that the MP's comments "verged on Islamophobia", and underscored the importance of tackling the high number of children with recessive disorders in a more comprehensive way, through education, not accusations (MPACUK 2008).

This is not the first time that politicians have raised this issue using the same stigmatizing language despite it being a very sensitive issue. In 2006 another Labour MP had apologised after claiming that inbreeding may be partly to blame for a rise in cases of diabetes in his constituency (Bowcott 2006, *The Guardian*).

#### **4.1.4. Civil versus religious marriage? Where and how do people get married?**

A man and a woman may get married by a civil or religious ceremony. In both cases two conditions must be satisfied. Firstly, both parties need to possess the capacity to contract a marriage (i.e. age, voluntariness, etc – see above). Secondly, they must observe the necessary formalities (Standley 2006).

In England and Wales, the rules on formalities differentiate between marriages to be performed according to rites of the Church of England (which includes the Church of



Wales), and the rest of marriages, religious or civil. In Scotland and Northern Ireland the distinction is simply between civil and religious ceremonies more generally (i.e. no 'differential treatment' for the national church). Formalities need to be carried out both before and during the marriage ceremony (Diduck and Kaganas 2006; Standley 2006).

#### **4.1.5. Preliminary formalities**

In England and Wales, civil or religious marriages (other than Church of England marriages) must be preceded by preliminary formalities for which the superintendent registrar of the relevant district is responsible. The granting of the superintendent registrar's certificate or of a registrar-general's licence is necessary for the marriage to be solemnised. To obtain the certificate both parties must give notice in person to the superintendent of the district/s in which each of them have been residing for at least the previous seven days. A declaration must be signed that all the requirements have been satisfied and a fee must be paid. After this, notice of the marriage (banns) is publicly displayed for 15 days, and if no objection to the marriage has been brought forward, the registrar issues a certificate after which the marriage must be solemnised within three months of the public notice. The registrar can also give the authority to marry in the place where one or both of the parties live or are detained, in cases of illness, disability or imprisonment. The licence (as opposed to the certificate) is available only in exceptional circumstances, when a person is seriously ill and not expected to move. It allows the solemnisation of marriage in a place other than those recognized for this purpose (Diduck and Kaganas 2006; Standley 2006).

A Church of England marriage can be solemnised either after the publication of banns, or on the grant on one of the licences above (Diduck and Kaganas 2006; Standley 2006).

The preliminaries in Northern Ireland and Scotland are similar. Each party to a proposed marriage is required to submit a marriage notice form, other relevant documents and fees to the Registrar of Marriages in the District where the marriage is to take place. As

opposed to England and Wales, the notice forms can also be submitted by post to the Registrar. Notice for all marriages must be given in the twelve month period prior to the date of the marriage, and it may take up to ten weeks for the Registrar to process the notices. When the Registrar is satisfied there is no legal impediment to the marriage, a marriage schedule is presented to the parties and must be returned to the Registrar after the ceremony so that the marriage can be registered (Scottish Executive 2006; Standley 2006).

#### **4.1.6. The Marriage Ceremony**

Civil marriages: the marriage can be solemnised in the registry office or in other approved premises. The civil ceremony is public and secular, but may be followed by a religious ceremony in a religious place. However in this event, it is the civil ceremony which is legally binding. The ceremony must be witnessed by at least two people of 16 or more years of age (Standley 2006).

Church of England marriages: the legally binding marriage is solemnised by a clergy person according to the Church of England rites in the presence of at least two witnesses of 16 or more years of age (Standley 2006).

Other religious marriages (except Jewish and Quaker): the ceremony must take place in a 'registered building'. If the marriage takes place in a non-registered building, it may be void. Together with the presence of two witnesses of 16 or more years of age, these ceremonies must be attended by a registrar or an 'authorised person'. The ceremony must be open to the public (Standley 2006).

Quaker and Jewish marriages: they are celebrated in their own rites after the formalities have been satisfied. For historic reasons they need not take place in a registered building, open to the public and in the presence of an authorized person. Both parties to a Jewish marriage must profess to belong to the Jewish faith (Standley 2006).

Lastly, all marriages, except Jewish and Quaker marriages and those that are conducted under Special or Registrar General's licence, must take place between 8.00 am and 6.00 pm (Standley 2006).

#### **4.1.7. When is a marriage void or voidable?**

The law of nullity is regulated by the MCA 1973 and can be sought at any time – the 'one-year bar' for the divorce does not apply here. A decree of nullity can be granted if the marriage is void or voidable.

A marriage is void when the parties are: within the prohibited degrees of relationship, under the age of 16, already married, not respectively male and female. It should be noted that if a child was born after a void marriage is granted, he/she is treated by the law as legitimate<sup>116</sup> if at the time of conception one or both parties reasonably believed that the marriage was valid (Standley 2006)

A voidable marriage is one which is valid until annulled by decree of nullity (a void marriage, on the other hand, was not valid in the first place). A marriage is voidable when: it has not been consummated due to incapacity or wilful refusal of either party to consummate it; either party did not consent to it; at the time of marriage either party was incapable of giving consent; at the time of marriage either or one of the parties had a transmittable venereal disease; at the time of marriage the petitioner's wife was pregnant by someone else (Standley 2006).

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<sup>116</sup> The status of illegitimacy, ascribed by common law to a child who is born or conceived out of wedlock, is still used in English law despite attempts to abolish the concept altogether (Lowe and Douglas 2007). Until after the Second World War, an illegitimate child was severely discriminated by law, for example by not having any rights of intestate succession, nor to receive maintenance. With the passing of new legislation in the 1970s, children of unmarried couples have now more or less the same rights as children who are born of a legally recognized union, however legitimacy is "to some extent still relevant in determining the legal relationship between a child and his parents" (Lowe and Douglas 2007: 341). For example, there are areas of discrimination in the succession of titles of honour. Moreover, whilst parties undergoing a divorce have to make plans for their child/children and ensure these are accepted by a court, the same scrutiny does not apply to the child/children of unmarried couples who are separating (Lowe and Douglas 2007).

**Comment**

The definition of ‘consummation’ in the MCA 1973 is particularly interesting. Consummation is the first act of intercourse after marriage. It must be “ordinary and complete, not partial and imperfect [...]. It takes place whether or not a condom is used [...], and whether or not ejaculation takes place” (Standley 2006: 35). Incapacity to consummate, moreover, must be permanent and incurable. It may also be emotional, not just physical, such as “an invincible repugnance to the respondent due to psychiatric or sexual aversion” (Standley 2006: 35). As a number of scholars point out, the expectation of sexual intercourse after marriage is problematic for a number of reasons (Lowe and Douglas 2007; Standley 2006; Probert 2005). It may, for example, have a role in forcing a partner to have intercourse when he/she in fact would otherwise refuse. Furthermore, as Probert points out, the ‘need’ for consummation may cause problems for transsexuals (2005). And interestingly, consummation is not a requirement of the civil partnership (see point 5.4); as the Department of Trade and industry stated: “consummation has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across the same-sex civil partnerships” (DTI 2003: 36, quoted in Stychin 2006a: 35)

**4.1.8. What are the fiscal benefits and privileges of marriage – e.g. tax (is there a married couples’ tax allowance?), social security and unemployment benefits, pensions and survivors benefits, carers’ allowances, inheritance rights?**

In the UK there is now no married couple's allowance, unless the elder spouse was born before 6 April 1935. To claim the married couple's allowance<sup>117</sup> the couple must be living together as a married couple. If the couple got married before December 2005, the allowance will usually go to the husband and the amount he gets depends on his income. If the couple married after December 2005, the married couple's allowance is given to the partner with the higher income (Directgov 2008a; HelptheAged 2008).

<sup>117</sup> This allowance has been extended also to civil partners in December 2005.

Married couples also have other fiscal benefits<sup>118</sup>. For example, whilst all individuals have an annual capital gains tax exemption, a married couple can potentially double it by transferring assets between spouses tax-free (Roy-Chowdhury 2006, *BBC*).

The other capital tax where a husband and wife are treated favourably is Inheritance Tax. In this case, there is a so-called ‘inheritance tax threshold’ applicable to any person’s estate above which inheritance tax is payable. The nil rate band where no inheritance tax is due was £300,000 per capita for 2007/08 (rising to £312,000 in 2008/09), and double that amount for spouses or civil partners. Moreover, for deaths on or after 9 October 2007, the proportion of the nil-rate band that is unused on the first death is available for transfer to the surviving spouse or civil partner to work out the inheritance tax liability on their estate when they die (HMRC 2007).

There are also a number of exemptions which allow a person to pass on amounts (during lifetime or in a will) without any Inheritance Tax being due. These include: wedding gifts and gifts in anticipation of a civil partnership up to £5,000. Gifts to an unmarried partner or partner not in a civil partnership are not exempt (Directgov 2008a).

- Other fiscal benefits

If a married couple has a joint bank account, the money is owned jointly regardless of who contributed to the account<sup>119</sup>. When one partner dies, the whole account immediately becomes the property of the other. This is the case even when the spouses’ (or civil partners’<sup>120</sup>) bank accounts were separate (as part of the inheritance acquired

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<sup>118</sup> Since 2005, these fiscal benefits apply also to same-sex civil partners. However, it is interesting to note that in the 2007 Budget Speech, the Chancellor of the Exchequer never mentioned civil partners in relation to having received (and rejected as penalising) “representations for the return of the married couples allowance, and for a transferable tax allowance between husbands and wives with children under five” (HM Treasury 2007). As the Chancellor stated, “Mr Deputy Speaker you do not support marriage by penalising most married couples and 11 million children” (ibid.).

<sup>119</sup> However, married partners are not responsible for each other’s debts, unless these have been incurred jointly.

<sup>120</sup> As mentioned earlier, all the fiscal benefits that apply to married couples also apply to civil partners.

automatically by a spouse), unless a will instructs a different course of action (Advicenow 2007). If either married partner dies without making a will, the other will inherit all or some of the estate. Also, the widow/er may be able to get a Bereavement Payment, a Widowed Parent's Allowance, and/or a Bereavement Allowance. A Bereavement Payment is a one off, tax free payment of £2,000. A Widowed Parent's Allowance applies to a surviving spouse or civil partner who has a dependent child or young person (aged 16 and under 20) for whom he/she receives Child Benefit (Directgov 2008b). A Bereavement Allowance (formerly known as Widow's Pension) is a regular payment, paid for 52 weeks from the bereavement, and based on the deceased spouse/partner's national insurance contributions (JobCentrePlus 2008). If a widow/er cannot get any of these bereavement benefits, she/he may be able to get Income Support as a single parent. This applies when: the child is his/hers and of the late spouse, or a child who he/she or his/her late spouse got Child Benefit for at the time of his/her spouse's death (for example, it could be an adopted child or a step-child) (Advicenow 2007).

Lastly, and more generally, it is relevant to note that all couples, whether married or living together, are treated in the same way when they are assessed for entitlement to most welfare benefits. As they will be expected to claim as a couple, the income, savings and financial needs of both partners are taken into account (Advicenow 2007).

#### **Comment**

In July 2007, the leader of the Conservative party David Cameron reportedly attacked the Labour tax system claiming that it penalises married couples. "Britain is almost the only country in Europe that doesn't recognise marriage in the tax system and the benefits system actively discourages parents from living together" (Tempest 2007, *The Guardian*). He then made recommendations to improve the situation, including the introduction of a tax allowance of up to £1000 a year to married couples with only one earner (Tempest 2007, *The Guardian*). Along the same lines, in a study published in January 2008, the Christian charity Care complained about the negative bias against

married couples is the current English taxation system (Care 2008). The study claims that “there is growing recognition that the [British tax and benefit system] penalises stable couples and encourages family breakdown and un-partnered childbearing” (Care 2008:6). This claim is based on the consideration that one-earner families are taxed in the same way as lone-parent families, with no recognition of the fact that in the case of one-earner couples, family earnings must be shared between two adults (Care 2008).

**4.1.9. What are the social benefits and privileges of marriage – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals etc?**

There are currently no benefits nor privileges for married couples in accessing social housing.

In relation to decision making in the event of illness, the Department of Constitutional Affairs states “no one – not even husbands or wives, partners, close relatives, professional carers or independent advocates – can legally give or withhold consent to medical treatment on behalf of another adult” (Department of Constitutional Affairs 2003). However, under the Mental Health Act 1983, which covered the assessment, treatment and rights of people with a mental health condition, certain rights can be given to the ‘nearest relative’, in order to protect the patient’s interests (Directgov 2008c). More specifically, the nearest relative can “apply for admission to hospital, [has] the right to block an admission for treatment, [has] the right to discharge a patient from compulsion and the right to certain information about the patient” (OPSI 2007: 15). As stated in the Act, the nearest relative is the older of the two people who are highest in the following list, regardless of gender: 1) husband, wife or civil partner<sup>121</sup>, 2) partner (of either sex) who has lived with the patient for at least six months, 3) daughter or son, 4) father or mother, 5) brother or sister, 6) grandfather or grandmother, 7) aunt or uncle, 8) nephew or niece. Out of this list, a person who lives with, or cares for, the patient is likely to be

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<sup>121</sup> ‘Civil Partner’ was added in the amended Mental Health Act 2007.

regarded as the nearest relative. A person who is not a relative, but who has lived with the patient for at least five years can also be regarded as the nearest relative. It should be noted that with the amendments introduced under the Mental Health Act 2007, patients have now the right to apply to displace their nearest relative, and county courts can also displace a nearest relative where there are reasonable grounds for doing so (Department of Health 2007).

The ‘next of kin’ is a common law concept that is to this day often confused with the ‘nearest relative’ (Mental Health Act Commission 2005). In healthcare, the term ‘next-of-kin’ has very limited legal meaning and relates to the disposal of property to blood relations, when someone dies without having made a will. However, it is the next of kin who can give full informed consent for the removal of tissue samples and organs for transplant, when the patient dies without leaving dispositions on this matter<sup>122</sup> (Directgov 2008d). A research of the regulations available from different NHS Primary Care Trusts revealed little information about who is considered to be a ‘next of kin’. This seems to suggest that the term is used in a rather loose manner. According to the information published by one PCT:

Historically, the next of kin was the spouse or nearest relative of the patient, but modern day families may have a different structure – cohabiting but unmarried, long term relationships but not cohabiting, same-sex partners etc. Your next of kin does not need to be a blood relative or spouse; they may be your long-term partner, cohabitee or even *a close friend* (Royal Berkshire NHS Foundation Trust 2008, emphasis added).

#### **4.1.10. Is rape in marriage a crime?**

Rape in marriage was criminalised as recently as 1982 in Scotland and 1991 in England, Wales and Northern Ireland. In England, marital exemption from rape was swept aside by the Court of Appeal during the revision of an appeal against a conviction of rape. The

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<sup>122</sup> See also section 4.4.10.



Court stated that the exemption “no longer even remotely represents what is the true position of a wife in present-day society” (quoted in Palmer 1997: 92, 93).

Before then, a woman had no legal protection for the crime of rape perpetrated against her by her husband. In fact, since the late 18th century, this was regarded as acceptable in common law, following this statement:

The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract. (Quoted in Lowe and Douglas 2007: 112).

**Comment**

As mentioned earlier, the expectation of consummation in a marriage is seen as controversial, given its potential role in forcing a partner into intercourse when in fact they would otherwise refuse it (Standley 2006). This raises questions about the fact that the ‘need’ for consummation may favour rape in marriage and contribute to concealing it.

**4.1.11. What is the law (if any) regarding domestic violence, and what policy initiatives are there to combat it?**

Until recently, the Home Office defined domestic violence as:

Any violence *between current or former partners* in an intimate relationship, wherever and whenever the violence occurs. The violence may include physical, sexual, emotional or financial abuse. (Home Office Circular, quoted in Standley 2006: 115; emphasis added)

This definition has now been amended with a view to providing a more comprehensive delivery of actions against domestic violence, which is now defined as:

Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) *between adults who are or have been intimate partners or family members*, regardless of gender or sexuality. (Home Office 2008; emphasis added).

This definition is wider and incorporates violence between family members over 18 as well as between adults who are, or were, intimate partners. Family members are defined as: mother, father, son, daughter, brother, sister, and grandparents, whether directly related, in laws or stepfamily. This more comprehensive definition ensures that issues such as forced marriage, so-called ‘honour crimes’ and forced female genital cuttings are included and covered by the current legislation (Home Office 2008; Standley 2006).

A quick review of the position of institutions and NGOs involved in tackling domestic violence revealed that the new definition is generally welcomed as it “provides consistency across the domestic violence sector and will help to improve monitoring of incidents of domestic violence across all agencies” (Islington Council 2006: 9). Moreover, it is generally appreciated that the definition makes clear that “it is the relationship rather than the location that determines whether the offence is committed in a domestic context” (Sentencing Guidelines Council 2006: 3). Nevertheless, it is also felt that, despite being more inclusive, the definition does not account for the fact that in the majority of cases domestic violence is gender-based and it is directed against women<sup>123</sup> (Sentencing Guidelines Council 2006; Islington Council 2006; Refuge 2004).

The most recent piece of legislation on domestic violence is the Domestic Violence Crime and Victims Act 2004 (which applies to England, Wales and Northern Ireland). The Act, which according to the Home Office is the “the biggest overhaul of domestic violence legislation for thirty years” (2008), gives new powers for the police and courts to deal with the offenders, whilst strengthening the victim’s case when brought to the attention of the criminal justice system. The Act includes the creation of an offence of causing or allowing the death of a child or vulnerable adult; makes common assault an arrestable offence; makes provisions for victims to receive support, protection and advice, and to improve the system in place to prevent future abuses and deaths. It also gives cohabiting same-sex couples the same access to non-molestation and occupation orders as heterosexual couples (Department for Constitutional Affairs 2008).

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<sup>123</sup> On this issue, see also Nyhagen Predelli, Perren et al (2008), a FEMCIt workingpaper.

**Comment**

Organizations dealing with domestic violence, such as Refuge and Women's Aid, welcomed the improvements introduced by the Domestic Violence Crime and Victims Act 2004. However, they also criticized the fact that the Act tends to reinforce the general trend to view violence against men in the same way as violence against women (see above). They pointed out that this approach does not account for the fact that the violence experienced by women is different in nature, severity and consequence, and that women's violence is most likely to occur in self-defence (Women's Aid 2005; Refuge 2004).

**Comment**

In July 2008, new proposals were made to change the 'defence of provocation' clause which is still present in homicide laws. The current law allows a person who kills his/her partner to escape a murder conviction by pleading the defence of provocation. The defence of provocation originates in the medieval tradition which justified a man's 'crime of passion' if his honour was insulted by an unfaithful/'dishonorable' wife. The new law would replace the defence of provocation with two new provisions, one addressing a killing in response to a fear of serious violence, and the other which follows words or conduct that give the defendant a sense of being seriously wronged (SkyNews 2008; Hinsliff 2003, *The Guardian*; BBC 2003).

**Comment**

Under current legislation, the Crown Prosecution Service (which is responsible for prosecuting criminal cases investigated by the police in England and Wales), can require husbands or wives (but also civil partners, unmarried partners or family members) to give evidence about abuse or injury by their spouse/partner. The CPS policy on prosecuting cases of domestic violence was revised in 2004/5 and a number of changes were introduced to improve the way cases of domestic violence are dealt with in the criminal justice system, particularly to ensure a better and more sensitive treatment of victims and witnesses (CPS 2005).

**Comment**

Amongst a vast array of governmental and non-governmental initiatives to tackle domestic violence, the Home Affairs Select Committee is currently conducting a special inquiry on Domestic Violence, Forced Marriage and Honour Based Violence (all covered under the new Home Office definition of ‘domestic violence’). As part of this initiative the committee also undertook an online consultation (which run until the end of February 2008) on how to best help those who have been abused. As a result of this consultation, a report was published in June 2008. The report calls for an increased focus on prevention and early intervention. It highlights the lack of education on domestic violence, and in the case of forced marriage, even the resistance showed by some schools to tackling the issue with students.

Another important point addressed in the report is the fact that marriage visas are still being granted where the visa sponsor has been forced into marriage for the purpose of sponsoring the visa. The report makes the recommendation of interviewing visa sponsors when there is suspicion of forced marriage, or when suspicion is raised by a third party. It also recommends that refusal of visa applications may be granted even when the sponsor is reluctant to make a statement.

The report also points out the shortage of refuge spaces and other emergency accommodation, as well as the threat of closure, due to lack of funding, that many associations supporting victims of domestic violence have to face on a daily basis. For example, the campaigning work and publications of the organization Southall Black Sisters are mentioned and referenced throughout the report as crucial to an understanding of the phenomenon. However, it is also acknowledged that the organization faced the threat of closure as a result of its local authority’s decision to withdraw funding in April 2008 (House of Commons Home Affairs Committee 2008). Whilst this decision was repealed in July 2008, thus marking a significant victory for Southall Black Sisters, the event also highlighted the financial precariousness of such organizations and their having to rely mostly on the financial aid of local governmental institutions which are not always keen on/capable of supporting them.

**Comment**

Domestic violence accounts for a quarter of all recorded crimes in England and Wales, and it is women who suffer most from it. Two women are murdered every week as a result of domestic violence – this is 35% of all murders in England. Domestic violence also has the highest rate of repeat victimisation compared to any other crime – on average there will have been 35 assaults before a victim calls the police (Home Office 2008).

**4.1.12. To what extent are the two parties to a marriage treated as a couple/unit, and to what extent are they treated as individuals?**

In English law, husbands and wives have separate legal personalities. For example, they can own property solely or jointly and can bring proceedings in tort and contract separately against each other or against a third party. They can make unilateral decisions about their own medical treatment, including the right of a woman to decide to abort (Standley 2006).

**Comment**

It is interesting to note that married women became entitled to keep their properties and wages only after the Married Women's Property Acts were passed in 1870 and 1882. Before then, a wife's personal property and earning automatically became that of her husband's (Diduck and Kaganas 2006). This suggests that until then, women in marriage were 'owned' by their husbands, and not treated as autonomous individuals. Moreover, up until the Sex Discrimination Act was passed in 1975, married women were often refused financial credit without their husband's signature (the same did not apply to married men who did not require their wives' signatures); and a woman's salary would not be considered as proof of her income when she applied for a mortgage (Financial Ombudsman Service 2004).

#### **4.1.13. Is there legislation/ public debate about forced marriages?**

The most recent piece of legislation specifically addressing forced marriage in England, Wales and Northern Ireland is the Forced Marriage (Civil Protection) Act 2007 which will come into force in autumn 2008. According to the Act, a person is deemed to be forced into a marriage if he or she is forced by another person to enter into a marriage without his or her free and full consent (Forced Marriage Unit 2008).

A particularly important provision of the Act is the insertion of sections which empower the High Court and county courts to make forced marriage protection orders (FMPOs). FMPOs can be used to provide legal means of protection for persons who are being or have been forced into marriage. With a FMPO a court can also issue an order to prohibit a family from taking an unwilling relative abroad for the purpose of marriage or an order forbidding members of a family from trying to contact or molest a person who has been/was going to be forced into marriage.

Interestingly, in view of the findings of a consultation process, it was decided that the Act would not make it a criminal offence to force a person into marriage. However, activities directed towards that end, including assault, grievous bodily harm or threatening behaviour are criminal and can be prosecuted (Forced Marriage Unit 2008).

##### **Comment**

It should be noted that in January 2005, the Home Office and the Foreign and Commonwealth Office established the Forced Marriage Unit to work closely with community organizations, particularly women's groups.

In March 2006, the Unit launched a national publicity campaign on forced marriage 'You have a right to choose' (on the left). Supported by popular actors Meera Syal and Ameet Chana, it involved a series of radio and press adverts, TV fillers and poster campaigns. It was aimed at raising awareness about the issue whilst disseminating information about how and where to seek help.

#### **4.1.14. Is there legislation/debate about incest?**

Incest became a criminal offence in 1908, with the Incest Act 1908. Previously it was only an offence under canon law (the ecclesiastical rules of the Anglican Church). More recently, the Sex Offence Act 2003 introduced new ‘familial child sex offences’ governing sexual activity within the family. These include sexual activity with a child family member, and inciting a child family member to engage in sexual activity. The Act also updated the notion of ‘family’ to cover not just blood relatives, but also foster and adoptive parents and live-in partners, thus reflecting new forms of familial structures.

Under the Act, the penalties for those who commit a sex offence against a familial child are: for a person aged 18 or over: imprisonment for a term not exceeding 14 years; and in any other case, “imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both” (Sex Offence Act 2003).

#### **4.1.15. What is the status of pre-nuptial agreements? Is there an issue about “assets regime” to be decided prior to marriage?**

In the United Kingdom, pre-nuptial agreements currently have no legal standing. However, whilst in many instances they have been recognized, divorce courts retain a supervisory jurisdiction to scrutinize them (Standley 2006).

The case of *M v M* (Prenuptial agreement) [2001] set out the following principles for drafting a pre-nuptial: both parties must disclose their financial positions and receive independent legal advice; the agreement must be signed 21 days or more before the marriage ceremony; and there must be provision made for the review of the terms agreed after a period (Standley 2006).

## **4.2. Divorce**

### **4.2.1. What is the law on divorce – grounds for divorce etc?**

The legislation on divorce in England and Wales is covered by the following Acts:

- the Matrimonial Causes Act 1973, which makes provisions on the grounds for divorce and on finance and property in the event of divorce;
- the Domicile and Matrimonial Proceedings Act 1973, which governs the jurisdiction to hear divorces;
- the Family Law Act 1986, Part II, which makes provisions on the recognition of foreign divorces;
- the Family Proceedings Rule 1991, which contains rules on divorce-related proceedings.

Under the Matrimonial Causes Act 1973, there is only one ground for divorce: that the marriage must have irrevocably broken down. To establish that the marriage has irrevocably broken down, the petitioner must prove the existence of at least one amongst the following five facts (often, mistakenly, referred to as the grounds for divorce): “1) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent<sup>124</sup>; 2) the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; 3) the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; 4) the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition [...], and 5) the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition” (Standley 2006: 156). In the latter case one can apply for a divorce without the partner’s agreement.

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<sup>124</sup> To note that a woman who is raped has not committed adultery, but a man who commits rape has.



It should be noted that divorce proceedings can only commence after the first year of marriage. The 'one-year bar' is absolute and non-discretionary, i.e. it has to be respected. In Northern Ireland the bar is for two years (Standley 2006).

#### **4.2.2. What is the history of divorce legislation? When did it become first available?**

The Christian idea of the marriage as an indissoluble union was predominant in the UK until the mid-nineteenth century. Even though a divorce could be obtained, it was possible only by Act of Parliament and through a lengthy and very expensive procedure (Diduck and Kaganas 2006; Standley 2006).

This situation changed with the Matrimonial Causes Act 1857 which introduced judicial divorce. However, divorce continued to be difficult to obtain as it was based only on one ground, i.e. adultery. The Act was also highly gendered. For example, whilst a petitioner husband only had to prove the adultery of the wife, a wife had to prove the 'aggravated adultery' of the husband, i.e. adultery plus another factor, such as incest, cruelty, bigamy, sodomy or desertion. Aggravated adultery was abolished by the Matrimonial Causes Act 1923, after pressure for reform by the female emancipation movement (Diduck and Kaganas 2006; Standley 2006).

Another Act in 1937 introduced new grounds for divorce, all related to matrimonial offences. Furthermore, to avoid hasty divorces, a three-year bar was introduced prohibiting the commencement of divorce proceedings before three years after marriage (Lowe and Douglas 2007).

After World War II, dissatisfaction with the status of the law on divorce led the Morton Commission to review it in 1956. However, the Commission recommended the retention of the matrimonial offences as the grounds for divorce, thus highly disappointing those who had asked for a review in the first place. A change in this sense was finally made in

the 1960s, after the publication of two more reports, one by the Church of England and the other by the Law Commission. Both recommended the abolition of the doctrine of matrimonial offence, which was incorporated in the new Divorce Reform Act 1969. Except for some amendments, this act remains law today (Lowe and Douglas 2007; Diduck and Kaganas 2006; Standley 2006).

#### **4.2.3. Do the major religious groups actively oppose divorce?**

Apart from the Roman Catholic Church, there appears to be no active opposition to divorce amongst main religious groups in the UK. However, some communities (Hindus, for example) still view divorce as highly stigmatizing, especially for women.

The Church of England does not encourage divorce, because it teaches that marriage is for life. However “it also recognizes that some marriages sadly do fail and, if this should happen, it seeks to be available for all involved. [Moreover] the Church accepts that, in exceptional circumstances, a divorced person may marry again in church during the lifetime of a former spouse” (The Church of England 2008). Indeed, it was Henry VIII’s wish to divorce back in the 16th century that created the Church of England as an independent Christian Church in the first place.

Other major Christian Churches and denominations, including the Church of Scotland, the Methodist and Baptist Churches believe that marriage is a life-long union, but are tolerant towards divorce (BBC 2008b).

The Roman Catholic Church, on the other hand, is adamant in its opposition to divorce. It considers marriage a sacred bond that cannot be broken. Even if a couple separates legally, for the Catholic Church its members are still considered joined together. In fact, those who remarry are seen as committing an act of adultery. In some exceptional cases, a marriage can be annulled by a Church tribunal through a very long and thorough procedure (Catechism of the Catholic Church 2000).

It is possible for a Jewish couple to divorce, and to remarry. However, as a civil divorce is not recognised in the eyes of the Jewish religion, the procedure has to be carried out and approved by a rabbinical court. Moreover, according to Jewish law, it is technically impossible for a woman to divorce her husband (the same applies to Islamic law), since through marriage it is “the husband [who] has formally acquired the wife as property” (Romney Wegner 1982: 15). While more liberal Jews are open to updating the rules to meet contemporary needs – including that of a more equal position of women in society – the Orthodox rabbinate has resisted change, thus making it very difficult for women to obtain divorce and reinforcing the stigma attached to divorced women (Romney Wegner 1982)

Islam allows divorce to “take place judicially or extra-judicially and be based on the grounds of fault or no fault. It may occur by the unilateral will of the husband, by mutual consent of the wife and husband, and by a court order” (Khir 2006: 302). When it is the wife who initiates divorce proceedings, it is up to the husband to agree to divorce her, usually in exchange for some money or the remission of her dowry (Islamic Sharia Council 2008). As Khir points out (2006), the difference between English law and Islamic law in divorce matters has resulted in difficulties for British Muslims, who (like British Jews) have to divorce twice– i.e. through civil and religious divorce. For this reason they have repeatedly asked to have a separate system of personal law for Muslims recognized by the state.

The demand for a Muslim family law to be applied to British Muslims started in 1970 and has continued up to the present time (Poulter, 1990, p. 147). It was met with continuous rejection [...]. One of the strong arguments against the Muslim claim for a separate personal law is that ‘family law relates to one of the essential organizational structures of social and legal administration and to allow one religious denomination to separate itself off completely in this manner might be felt to be unacceptably divisive’ (Poulter, 1990, p. 156).

Hindus view marriage as a sacrament. For this reason divorce is permitted, but only in exceptional circumstances, such as cruelty, adultery, venereal disease, desertion for two years, conversion, irreconcilable problems, etc (Diwan 1957).

**Comment**

The issue of differences between the ‘law of the land’ and beliefs and procedures applied within each religious community were raised in February 2008 by the Archbishop of Canterbury, Dr Rowan Williams. In the course of a lecture at the Royal Courts of Justice on ‘Civil and Religious Law in England’, the Archbishop raised issues that generated very strong reactions in the media, within religious and governmental institutions, and elsewhere. He explored, using Sharia law as an example, “the limits of a unitary and secular legal system in the presence of an increasingly plural (including religiously plural) society [...], to see how such a unitary system might be able to accommodate religious claims. Behind this is the underlying principle that Christians cannot claim exceptions from a secular unitary system on religious grounds (for instance in situations where Christian doctors might not be compelled to perform abortions), if they are not willing to consider how a unitary system can accommodate other religious consciences. In doing so the Archbishop was not suggesting the introduction of parallel legal jurisdictions, but exploring ways in which reasonable accommodation might be made within existing arrangements for religious conscience” (The Archbishop of Canterbury 2008). Dr William’s speech was mis-reported by the media which sent the inaccurate message that “he backed the introduction of sharia law in Britain and argued that adopting some of its aspects seemed ‘unavoidable’” (Butt 2008, *The Guardian*). At the same time, however, his speech raised the issue of ‘cultural’ codes of practice which are informed by various religious beliefs and that impact upon various intimate citizenship aspects, including divorce, so-called ‘honour’ oppression, domestic violence, etc.

**4.2.4. What happens to property and pensions on divorce?**

Court proceedings in divorce cases are sought only when parties cannot reach agreement, otherwise the emphasis is on settlement or negotiation (Standley 2006).

As far as property is concerned, when an agreement is not reached between the parties, through a ‘Transfer of Property Order’ the court may direct one of the two parties to transfer property to the other. This is often used to transfer the matrimonial home. The transferee may be given a charge over the house for a fixed amount or a percentage of the value which is to be realised at a later date” (Standley 2006: 183). The court can also order the sale of property in which one or both spouses have a beneficial interest. This is often the case when pre-agreed lump sums in favour of a spouse had not been paid (Standley 2006).

In the case of pension, there are various ways of sharing its value in case of divorce. Firstly, by “offsetting”, i.e. rather than splitting the pension, pension values may be “offset” against other matrimonial assets (for example, one spouse may keep the family home, whilst the other keep the pension). Secondly, the Pensions Act 1995 allows courts to make an “earmarking” order. This means that a portion of the pension may be paid to the spouse on the retirement of the named pension fund holder. Thirdly, under the Welfare Reform and Pensions Act 1999, the courts have the power to “split” a pension so that both husband and wife have separate, independent pensions. This is viewed as the best solution for both parties, in that it allows each to benefit from the pension, independently from what the other is doing (Diduck and Kaganas 2006: *ibid.*).

#### **4.2.5. How are decisions about children made after divorce, and what principles apply concerning residence/ custody etc?**

A crucial aspect of divorce law is to protect the best interests of dependent children<sup>125</sup> (Standley 2006). When divorce occurs, parents continue to have parental responsibility, hence a Statement of Arrangements for Children needs to be considered and approved by the district judge (Standley 2006).

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<sup>125</sup> A dependent child is one who is under 16, or under 19 if in full-time education. A dependent child can be the child of both partners together, an adopted child, a step-child and any child who has been treated as part of the family. The definition does not include foster children (Standley 2006).

Most divorcing parents make their own amicable arrangements about their children, and in this case, courts will intervene only if such arrangements are not in the best interest of children (Lowe and Douglas 2007; Standley 2006). When agreement is not reached, disputes are dealt with by the court. A court can make orders about who the child should live with (a residence order), and who the child should have contact with and what sort of contact it should be (a contact order).

The court can make a residence order in favour of: one parent (in this case the child must live with that parent); both parents (a residence order for both parents, ruling how much time the child will live with each parent); each parent (each parent will have a separate order on how much time the child will live with them)<sup>126</sup>. When deciding whether or not to make a residence order, the court must apply the following principles: the child's welfare is the paramount consideration; the minimum intervention principle; and the welfare checklist<sup>127</sup>.

Furthermore, a residence order prevents anyone from: 1) changing the surname of any child who is the subject of the order, and 2) removing any child who is the subject of the order from the UK (for more than 1 month), without the agreement of everyone with parental responsibility or with an order of the court.

The contact order establishes what sort of contact a parent (but also siblings, and other family members) can have. For example, visiting, telephoning or writing letters. Orders can also be made to allow contact between a child and other relatives or friends.

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<sup>126</sup> Before residence orders were introduced in 1991 with the Children Act 1989, parental disputes were resolved in custody proceedings. However, the Law Commission criticised the notion of custody, because it had become in many instances a matter of parental claim, thus increasing hostility between the parents. Residence orders, on the other hand, aim at placing an emphasis on the child and his/her living arrangements, rather than on which parent has a greater claim on their child (Standley 2006).

<sup>127</sup> A welfare checklist includes: the child's wishes, the child's physical and emotional needs, the likely effect on the child of a change in circumstances, the age, sex, background and any of the child's characteristics which the court may consider relevant, any harm that the child has suffered or is likely to suffer, how capable is each parent to meet the child's needs (Lowe and Douglas 2007; Standley 2006).

As far as financial responsibility is concerned, at the end of a marriage, both parents are responsible for supporting the children financially, regardless of where the children will live (Lowe and Douglas 2007; Standley 2006).

**Comment**

It is worth mentioning here the troubled history of the Child Support Agency (CSA), and the controversies that surrounded its existence since it was created in 1993. The CSA was set up by the Conservative Government with the aim of ensuring that so-called absent parents, usually thought to be fathers, would take financial responsibility for their children (BBC 2006b). Even before the agency was up and running, civil rights and fathers' groups took the streets to protest against the new system. Changes in the agency's structure and proceedings were subsequently announced by the new Labour Government in the late 1990s (BBC 2006b). However, the CSA remained a very controversial and allegedly inefficient body (Citizens Advice Bureau 2005) and, as a consequence, the Child Maintenance and Other Payments Bill introduced into Parliament in June 2007 proposed its dismantlement and the establishment of a new Commission altogether (CSA 2008).

In March 2008, another piece of legislation went through parliament to reduce the work of the CSA by enabling parents on benefits to make their own private and amicable arrangements, rather than using the agency. Charities, including Child Poverty Action Group, One Parent Families/Gingerbread and Resolution, expressed their concern, claiming that single mothers in particular (those who in the majority of cases take care of children) may end up getting inadequate advice, and not receiving financial support (Robins 2008, *The Observer*). On the other hand, fathers' groups have welcomed the proposal of voluntary arrangements. As reported by the Observer, a representative of Families Need Fathers said that, "it is obviously good to encourage people to stay out of court. [The proposals contain] the grain of a positive approach to encourage shared parenting" (Robins 2008, *The Observer*).

### **4.3. *Non-marital heterosexual relationships***

#### **4.3.1. Is there law governing heterosexual cohabitation/ de facto relationships?**

There is not a specific Act governing heterosexual cohabitation in England. However, heterosexual (and same-sex) cohabitation receives ad hoc recognition in particular legal contexts, as explained below (see section 4.3.2).

It should also be noted that many people wrongly believe that in England and Wales there is a ‘common law marriage’ which gives opposite-sex cohabitants quasi-marital rights (Barlow, Burgoyne et al 2008). In fact, the concepts of ‘common law wives’ and ‘common law husbands’ were abolished in 1753 by the Marriage Act (Webber 2005). Interestingly, however, a common law marriage by cohabitation was possible in Scotland until 2006, when it was repealed by the Family Law (Scotland) Act 2006. Before then, “if a man and a woman who are free to marry each other cohabit as husband and wife in Scotland for a considerable time and are generally regarded as being husband and wife they are presumed to have consented to be married, even if only tacitly, and, if the presumption is not rebutted, will be held to be married by cohabitation with habit and repute” (Scottish Executive 2008).

Lastly, cohabitants can enter into a cohabitation contract to regulate their affairs. However, cohabitation contracts remain open to challenge in court and may not be upheld (Standley 2006).

#### **4.3.2. What are the rights and responsibilities of heterosexual cohabitants/ de facto partners?**

- Property rights

Here are very few statutory provisions specifically addressing cohabitants. In this sense,



opposite-sex cohabitants (but also same-sex ones) are in a vulnerable position with regards to property entitlement on relationship breakdown and on the death of their partner, because they do not have the same entitlements as married couples or civil partners.

These provisions apply to cohabitants: 1) under the Inheritance (Provisions for Family and Dependents) Act 1975, a surviving partner can apply for financial provisions out of the deceased partner's property; 2) under the Family Act 1996, orders regulating or prohibiting the occupation of the family home by the perpetrator of domestic violence applies also to non-married cohabitants; and 3) succession to a tenancy on death applies also to cohabitants.

- Adoption Rights

Under the Adoption and Children Act 2002, cohabitants can make a joint application for adoption.

- Financial responsibility

Cohabitants have no mutual responsibility to provide each other with financial support, during or after the breakdown of a relationship (as opposed to married couples and civil partners). Hence, they have no right to apply for court orders on these matters.

- Parental responsibility

Cohabitants have a duty to maintain their children during or after the breakdown of a relationship. It is important to note that an unmarried father does not have 'automatic' parental responsibility for his children, although he can obtain it in various ways (see section 4.6.3)

(Citizens Advice Bureau 2008; Webber 2005).

**4.3.3. Are there fiscal benefits and privileges for cohabitants/de facto partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers’ allowances, inheritance rights?**

While there are specific fiscal provisions for married couples and civil partners, cohabitants must rely on property law principles to determine their rights (Standley 2006). Cohabitants may be in vulnerable position if they do not own a property, and also on the death of the partner because they have no statutory right to succeed to the deceased partner’s estate. However, (see above) under the Inheritance (Provisions for Family and Dependents) Act 1975, a surviving partner can apply for financial provisions out of the deceased partner’s property.

Cohabitants, like married couples and civil partners have their income assessed jointly when claiming Income Support or income-based Jobseeker’s Allowance, Working Tax Credit or Housing Benefit.

Lastly, a low income cohabitant (just like married couples and civil partners) may be able to get help with the costs of the funeral of the partner.

**4.3.4. Are there social benefits and privileges for cohabitants/ de facto partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

There are currently no benefits nor privileges for cohabitants in accessing social housing. In relation to decision making in the event of illness, the Department of Constitutional Affairs states “no one – not even husbands or wives, partners, close relatives, professional carers or independent advocates – can legally give or withhold consent to medical treatment on behalf of another adult” (Department of Constitutional Affairs 2003). However, under the Mental Health Act 1983, which covered the assessment, treatment and rights of people with a mental health condition, certain rights can be given

to the ‘nearest relative’, in order to protect the patient’s interests (Directgov 2008c). More specifically, the nearest relative can “apply for admission to hospital, [has] the right to block an admission for treatment, [has] the right to discharge a patient from compulsion and the right to certain information about the patient” (OPSI 2007: 15). As stated in the Act, the nearest relative is the older of the two people who are highest in the following list, regardless of gender: 1) husband, wife or civil partner<sup>128</sup>, 2) partner (of either sex) who has lived with the patient for at least six months, 3) daughter or son, 4) father or mother, 5) brother or sister, 6) grandfather or grandmother, 7) aunt or uncle, 8) nephew or niece. Out of this list, a person who lives with, or cares for, the patient is likely to be regarded as the nearest relative. A person who is not a relative, but who has lived with the patient for at least five years can also be regarded as the nearest relative. It should be noted that with the amendments introduced under the Mental Health Act 2007, patients have now the right to apply to displace their nearest relative, and county courts can also displace a nearest relative where there are reasonable grounds for doing so (Department of Health 2007).

The ‘next of kin’ is a common law concept that is to this day often confused with the ‘nearest relative’ (Mental Health Act Commission 2005). In healthcare, the term ‘next-of-kin’ has very limited legal meaning and relates to the disposal of property to blood relations, when someone dies without having made a will. However, it is the next of kin who can give full informed consent for the removal of tissue samples and organs for transplant, when the patient dies without living dispositions on this matter<sup>129</sup> (Directgov 2008d). A quick search of the regulations available from different NHS Primary Care Trusts revealed little information about who is considered to be a ‘next of kin’. This seems to suggest that the term is used in a rather loose manner. According to the information published by one PCT:

historically, the next of kin was the spouse or nearest relative of the patient, but modern day families may have a different structure -

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<sup>128</sup> ‘Civil Partner’ was added in the amended Mental Health Act 2007.

<sup>129</sup> This procedure is currently under revision, see section 4.4.10.

cohabiting but unmarried, long term relationships but not cohabiting, same-sex partners etc. Your next of kin does not need to be a blood relative or spouse; they may be your long-term partner, cohabitee or even a close friend (Royal Berkshire NHS Foundation Trust 2008).

#### 4.3.5. How different from marriage are non-marital heterosexual relationships in terms of fiscal benefits and social benefits?

	Married couples and Civil Partners	Cohabitants
Married Couple's Allowance	Yes	No
Capital gains tax exemption	Yes	No
Benefits on Inheritance tax	Yes	No
Automatic Inheritance	Yes	No
Access to deceased partner's bank account	Yes	No
Bereavement benefit	Yes	No
Welfare benefits	Yes	Yes
'Nearest relative' in Mental Health Act	Yes	Yes (with conditions)
Protection from domestic violence	Yes	Yes
Adoption Rights	Yes	Yes
Father's parental responsibility	Yes	Not automatic

#### 4.3.6. What is the law (if any) regarding domestic violence, and what are the policy initiatives to combat it?

The Government defines domestic violence as

Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) *between adults who are or have been intimate partners or family members*, regardless of gender or sexuality. (Home Office 2008; emphasis added)

This definition incorporates violence between family members over 18 as well as between adults who are, or were, intimate partners, including cohabitants. The courts can grant non-molestation orders and occupation orders to cohabitants, in order to protect victims of domestic violence.

Moreover, cohabitants and former cohabitants who are victims of domestic violence by

their partner/former partner can apply for an occupation of the property they share, or used to share, with their (ex) partner (Home Office 2008).

**4.3.7. To what extent are the two parties to a cohabitation/de facto union treated as a couple/unit, and to what extent are they treated as individuals?**

In all legal proceedings, whether civil or criminal, cohabiting partners are treated as separate individuals.

**Comment**

In May 2006 the Law Commission published a consultation on the financial consequences of relationship breakdown for cohabiting couples. Following the consultation, in 2007 the Commission published a report to Parliament. This report contains the final recommendations regarding the law as it affects the property and finances of cohabitants when their relationships end, either by separation or by death. The report acknowledges the inadequacy of the current law, but maintains that cohabitants should not have access to exactly the same remedies as married couples and civil partners. This is due to different degrees of commitment and interdependence exhibited by cohabitants that, in many instances, are different from those of married couples and civil partners. Furthermore, “cohabitants have not made the distinctive legal and public commitment that marriage entails” (Law Commission 2007b: 2).

The report proposes that legislation “should provide for the possibility of financial relief on separation between cohabiting couples who satisfy specified eligibility criteria” (Law Commission 2007a: 68). The recommended scheme would apply only to cohabitants who have a child together or who had lived together for a specified number of years (a “minimum duration requirement” which is not specified in the recommendations, although between two to five years is deemed appropriate). The Commission states that the system it proposes would be a considerable improvement in the current law, and that

it would help individual cohabitants and their children, and provide economically vulnerable members of society with the private means to rebuild their lives and to ensure a fairer division of assets on relationship breakdown (Law Commission 2007a; 2007b).

#### **4.4. *The Regulation of Sexual Practice***

##### **4.4.1. Has male homosexuality and lesbian sexuality been criminalized? What was illegal? What is the history of decriminalization?**

Male homosexuality has been illegal and punishable in Britain for many centuries. It was only in 1967 that homosexual acts between men were finally decriminalized. The law has always ignored lesbian sexuality; however, there are (very few) records of women cross-dressers prosecuted under laws penalizing vagrancy, fraud, or other misdemeanours (Bennett 2000).

Even though the first mention of a punishment of (male) homosexuality in English common law dates back to the 13th century, it was the 1533 Buggery Act introduced by Henry VIII that brought sodomy within statutory law and made it punishable by hanging. The death penalty for ‘buggery’ in England and Wales was subsequently abolished in 1861. In 1885 Parliament enacted the Labouchere amendment which created the offence of ‘gross indecency’ between males, a term that was understood to encompass most or all male homosexual acts. In 1954 the Wolfenden Committee was appointed to consider the law in Britain relating to homosexual offences, and published a report in 1957. Ten years later in 1967, following the recommendation made in the Wolfenden report, the Sexual Offences Act came into force in England and Wales decriminalising homosexual acts between two men over 21 years of age and ‘in private.’

In Scotland male homosexuality was decriminalised in 1980, two years later in Northern Ireland (1982), and in 1992 in the Isle of Man.

In 1994 the age of consent for male homosexual sex was reduced from 21 to 18. In 2000 the Government lifted the ban on lesbian and gay men serving in the armed forces. The passage of the Human Rights Act 1998 resulted in further broadening of the legality of homosexual acts, culminating in the age of consent being equalised with the age of

‘heterosexual consent’ at 16 in 2001. The 2004 Civil Partnership Act was passed in November, giving same-sex couples the same rights and responsibilities as married heterosexual couples. Lastly, the Equality Act (Sexual Orientation) Regulations 2007 became law in April 2007 making discrimination against lesbians and gay men in the provision of goods and services illegal (see section 4.7).

(Stonewall 2008a; Waites 2003; Ellis and Kitzinger 2002; Waites 2001)

#### **4.4.2. What is the age of consent (hetero/ homo)?**

Since 2001 the age of consent for heterosexual and homosexual men and women has been 16 in England, Wales and Scotland, and 17 in Northern Ireland - equalising the age for all. It should also be noted that any sexual intercourse with a child under 13 is charged as rape.

The ‘trajectory’ of the legal age of consent for (male) homosexual sex has been from 21 years of age to 18, and then 16 in 2001. Interestingly, for heterosexual sex, changes in the law have followed a ‘reverse’ age pattern, i.e. from 10 to 13 years in 1875 (10 and 13 being the age when a girl could legally consent to sex), to the current 16 in 1967 for both men and women (Thorp 2000).

#### **4.4.3. Is incest illegal? What is its definition?**

Incest became a criminal offence only in 1908, with the Incest Act 1908. Previously it was only an offence under canon law (the ecclesiastical rules of the Anglican Church). More recently, the Sex Offence Act 2003 introduced new ‘familial child sex offences’ governing sexual activity within the family. These include sexual activity with a child family member, and inciting a child family member to engage in sexual activity. The Act also updated the notion of ‘family’ to cover not just blood relatives, but also foster and adoptive parents and live-in partners, thus reflecting new forms of familial structures.



Under the Act, the penalties for those who commit a sex offence against a familial child are: for a person aged 18 or over: imprisonment for a term not exceeding 14 years; and in any other case, “imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both” (Sex Offence Act 2003).

#### **4.4.4. What is state policy around sex education in school?**

According to the Learning and Skills Act 2000, all schools should have an up-to-date policy for ‘sex and relationship education’, to be developed in consultation with parents. The policy adopted in each school should reflect parents’ wishes and the culture of the community served by the school. Moreover, the policy must satisfy certain requirements, including: stating clearly how sex and relationship education will be provided, how sex and relationship education will be monitored and evaluated, how it will be reviewed, etc.

In terms of content, what should be taught about sex and relationships is included in the framework for ‘Personal, Social and Health Education’ (a non-statutory part of the National Curriculum since September 2000), and the ‘2000 Sex and Relationship Education Guidance’. According to this Guidance:

The objective of sex and relationship education is to help and support young people through their physical, emotional and moral development. A successful programme, [...], will help young people learn to respect themselves and others and move with confidence from childhood through adolescence into adulthood. (Department for Education and Employment 2000: 3).

Of particular interest is the answer to the following question: ‘What is sex and relationship education?’:

It is lifelong learning about physical, moral and emotional development. It is about the understanding of the *importance of marriage for family life, stable and loving relationships*, respect, love and care. It is also about the

teaching of sex, sexuality, and sexual health. It is not about the promotion of sexual orientation or sexual activity – this would be inappropriate teaching. (Department for Education and Employment 2000: 4; emphasis added).

As far as sexual orientation is concerned, the Guidance makes clear that teachers should be able to “deal honestly and sensitively with sexual orientation, answer appropriate questions and offer support. There should be no direct promotion of sexual orientation.” (Department for Education and Employment 2000: 13).

**Comment**

In relation to education and sexual orientation, it is worth mentioning the infamous ‘Section 28’ of the Local Government Act (1988) which prohibited local authorities from promoting “the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship”. Parliamentary debates to repeal Section 28 have been extremely acrimonious. It was only at the end of 2003 that Section 28 was eventually abolished (Waites 2003 and 2001).

**4.4.5. What is the law concerning prostitution – is it legal/ tolerated/ illegal? Who is prosecuted (the prostitute or the purchaser of sex)?**

In the UK it is legal both to supply and to purchase sexual services for money or other goods. However, activities associated with the supply (and less so, the demand) of sexual services are criminal offences. These include: loitering or soliciting in a public place for the purpose of prostitution (Street Offences Act 1959); kerb crawling (Sexual Offences Act 1985); the placing of advertisements relating to prostitution on or in the vicinity of telephone boxes (Criminal Justice and Police Act 2001); ‘pimping’ offences, including controlling prostitution (Sexual Offences Acts 1956 and 2003).

As mentioned above, the supply of prostitution is usually penalized more than the demand. However, since the 1990s, in the UK, there has been considerable policing

activity targeting *clients* of prostitutes – particularly those who kerb-crawl on the streets – compared to other European countries with similar legislation on prostitution (i.e. criminalizing the activities surrounding it, rather than making prostitution itself illegal) (Kantola and Squires 2004).

It should also be noted that the Sexual Offences Act 2003 amended the gendered language<sup>130</sup> previously used to indicate offences related to adult prostitution by making them gender-neutral. Moreover, it removed any distinction between homosexual and heterosexual prostitution.

#### **4.4.6. Is there a public debate about prostitution, and if so, what are its parameters?**

Prostitution has been a matter of contention in the UK for many decades now, and numerous attempts have been made to change the current legislation. However, despite the advocacy of campaigns led by ‘English Collective of Prostitutes’, the ‘International Union of Sex Workers’ and the ‘UK Network of Sex Work Projects’, dominant discourses on prostitution in Britain have remained for many years now strictly linked to the issue of kerb-crawling, thus defining and dealing with prostitution as a public nuisance. As Kantola and Squires point out (2004), the public nuisance discourse became predominant in the UK following the publication of the Wolfenden Committee report in 1957 (see section 4.4.1 of this chapter). This framed prostitution as a matter of private morality, except when it creates a public nuisance, for example through road-traffic disruptions by kerb-crawlers.

More recently, debates on prostitution have become highly influenced by the issue of trafficking for sexual purposes. This has resulted in the discursive conflation of what are often very different phenomena: female street prostitution, sexual exploitation, sex trafficking, and abuse of children through exploitation. The taken-for-granted, yet unsubstantiated overlap between these very different aspects of the sex industry emerged

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<sup>130</sup> Based on the assumption that a prostitute would be a woman and the client a man.

also in recent policy documents. For example, following its review of the Sexual Offences Act (2003), the Home Office undertook a review of legislation on prostitution. As a first step towards this end, in 2004 it published a public consultation paper on prostitution. However, various organizations providing support and assistance to prostitutes criticized the consultation paper for its lack of consideration to the diversity of the sex industry, and its predominant focus on and conflation of female street prostitution and exploitation. On the other hand, organizations with an anti-prostitution stance underlined the need to establish more connections between female prostitution, abuse and sex trafficking.

The coordinated prostitution strategy for England and Wales published in 2006 reflects some of the approaches presented in the consultation paper. Whilst the focus is to “improve the safety and quality of life of communities affected by prostitution, including those directly involved in street sex markets”, the overall intent is to work on the prevention of ‘trafficking and prostitution’ (coupled together in an undistinguished manner), and the disruption of street sex markets. The decriminalization and protection of ‘sex work’ approach advocated by sex workers’ groups thus remained unrecognized.

**Comment**

In January 2008, the Government uncovered its plan to follow the Swedish model of criminalizing the purchase, or attempted purchase of sexual services whilst decriminalizing its sale (Williams 2008). The prospect of applying the Swedish model to England has had a result the mobilization of many different groups: some supporting, yet others opposing it. Indeed the fierce debate that has ensued from this proposal confirms the highly controversial nature of the issue of prostitution, and the extent to which it continues to deeply divide feminist groups.

**4.4.7. Is there policy around trafficked women?**

Trafficking emerged on the UK’s agenda largely via international and European influence (Kantola and Squires 2004). The first active step to combat trafficking was

taken in 2000, with the signing and adoption of the UN Convention Against Transnational Organized Crime and its attached protocol on trafficking. The protocol (so-called ‘the Palermo Protocol’) states that victims of trafficking need access to support services including: appropriate accommodation, information in a language they can understand, medical and psychological assistance, legal advice, and training and employment opportunities.

Apart from these obligations under international law, there has been no specific anti-trafficking national legislation in the UK until 2002. From that year, the passing of the Nationality, Immigration and Asylum Act made trafficking of people for prostitution illegal. This legislation was strengthened in 2003, when the Sexual Offences Act (2003) introduced legislation to make trafficking for sexual exploitation (not just for prostitution) a crime. In 2004 the Asylum and Immigration (Treatment of Claimants) Act further criminalised trafficking for all purposes, including forced labour.

Although the UK Government has now criminalised trafficking, the legislation lacks concrete provision for the care needed by victims. In this respect, in 2005 the Council of Europe adopted the Convention on Action against Trafficking in Human Beings. The Convention provides minimum standards of care for victims of trafficking, including: a minimum reflection and recovery period; temporary residence permits for those who may be in danger if they return to their country of origin or, for a child, if it is in their best interest to remain in the UK; access to specialist support, emergency medical care, legal advice, and the provision of safe housing. In January 2008 the UK Government announced that it would sign the Council of Europe’s Convention, thus committing to delivering minimum standards of care for victims of trafficking.

**Comment**

On the 4th October 2005, the news on television and newspapers were dominated by the police ‘rescuing operation’ of thirteen women who had been reportedly trafficked for sexual purposes and had been forced to prostitute themselves in a brothel in Birmingham.

A few days later, after media interest in the event had dissolved, some sources (Anti Slavery International and activists' networks) revealed that human rights lawyers had been refused access to the women, who were being held in a detention centre, on the grounds that they were not victims of trafficking, but illegal migrants. Academics and campaigners demanded fair treatment of these women, especially after the police and Government had used their story, just a few days before, to show their commitment to helping and assisting 'victims of trafficking'. This particular incident revealed the limit and ambiguity of the notion of assistance to victims of trafficking, and its being tightly linked to the 'victim' proving and admitting his/her condition of victimhood. In theory, the Council of Europe's Convention on Action against Trafficking in Human Beings is aimed at creating a much improved structure of assistance for people involved in trafficking.

#### **Comment**

At the beginning of February 2008, the police made a series of raids in Slough, in the outskirts of London, to 'save poor Romanian Roma children from their families', who, apparently, were planning to force them into criminal activities (BBC 2008c). The event received substantial public attention, also because the media had been 'invited' to the early morning raids. As reported by the BBC, "police believe they have smashed a Romanian criminal gang smuggling children as young as five into the country to beg and steal. [...] The children rescued in Thursday's raids have been interviewed by specialist officers ..." (BBC 2008c; emphasis added).

A few days later, all children had been returned to their homes in Slough, and none of the 24 adults arrested at the scene has been charged with child trafficking offences. As a Romanian diplomat told *the Guardian*, the raid was not only a huge fiasco, but it did nothing but further stigmatize the already socially excluded Roma community across the UK (Pidd and Dood 2008, *The Guardian*).

## **4.5. *Same-Sex Partnerships***

### **4.5.1. What is the age of consent?**

Since 2001 the age of consent for heterosexual and homosexual men and women is 16 in England, Wales and Scotland, and 17 in Northern Ireland – equalising the age for all.

### **4.5.2. What is the history around the age of consent?**

Since the (partial) decriminalization of male homosexuality with the 1967 Sexual Offences Act in England and Wales, the gay, lesbian and bisexual movement has been actively campaigning for an equal age of consent at 16 (Waite 2003 and 2001).

The case of three young men at the European Court of Human Rights in 1993 marked the beginning of further intensified campaigning activity, which resulted in the age of consent for sex between men being lowered from 21 to 18 in February 1994. The success was only partial, in that the amendment to reach equality at 16 had been narrowly defeated, but Labour party figures (including shadow Home Secretary Tony Blair) outspokenly supported ‘equality at 16’ (Waite 2003 and 2001). Hence, after Labour’s victory in 1997, parliamentary debates to amend legislation were initiated. This mobilization was also spurred by a report of the European Commission of Human Rights which concluded that by maintaining an unequal age of consent, the UK was in violation of the European Convention on Human Rights.

Nevertheless, parliamentary discussions to amend the Crime and Disorder Bill (1998) in favour of the equal age of consent at 16 were fierce and heated (Waite 2003). Many conservatives attacked the proposal, stressing the importance of the law in upholding ‘traditional sexual values’. Baroness Young went as far as defining the amendment as a ‘paedophile’s charter’. In support of the sexual conservatives’ position were also campaigning organizations including the Conservative Family Campaign (active in 1994), the Christian Institute, as well as religious leaders such as the Archbishop of

Canterbury, and the Chief Rabbi. The centre and left were on the other hand in favour of the equal age at 16, and were highly supported by lesbian and gay lobbying group, Stonewall, which played a crucial role in structuring the terms of public debate. Other prominent organizations, many concerned with the promotion of children's and young people's welfare, also campaigned for this position. These included: Barnardo's, Save the Children, the National Society for the Prevention of Cruelty to Children, National Children's Bureau, National Children's Homes Action for Children, the British Association of Social Workers, the National Association of Probation Officers, the Family Welfare Association, the National Youth Agency, and the British Medical Association (Stonewall 2008a; Waites 2001 and 2003).

An equal age of consent was finally attained with the passage of the Sexual Offences (Amendment) Act (2000) on 30 November 2000.

In response to the amended Act, in a letter to The Daily Telegraph, many religious leaders pleaded with the government to "protect young people of both sexes from the most dangerous of sexual practices" (BBC 2000). Among the 17 signatories were the Archbishop of Canterbury, the head of the Roman Catholic Church in England, and the secretary general of the Muslim Council of Great Britain.

#### **4.5.3. Is there provision for the recognition of same-sex partnerships (or are same-sex partners "legal strangers")?**

The Civil Partnership Act 2004 (in force since December 2005) creates a legal status for same-sex partners which gives them rights, powers and duties similar to those of married couples (Lowe and Douglas 2007; Standley 2006).



**4.5.4. If so, what is it called – and has there been a debate about whether it should be “marriage” or not? Outline the parameters of the debate in parliament, and in the media, and who the key players were/are, including religious groups, if applicable.**

Since December 2005, same-sex couples can enter a civil partnership under the Civil Partnership Act 2004.

Before the introduction of civil partnerships, same-sex couples were only able to informally register under various schemes in specific localities, including Manchester, Leeds, Brighton, London, etc. For example, the Mayor of London set up the London Partnerships Register in 2001, to recognise the partnership status of both same-sex and heterosexual couples. However, these schemes had no legal status, hence no legal effects. For this reason, same-sex couples were denied the same benefits that married couples could benefit from, including pension, inheritance and property rights. Gay pressure groups, with Stonewall at the forefront, campaigned to raise awareness on the difficulties of same-sex couples and asked to introduce a Bill on same-sex relationships. A civil partnership Bill was indeed proposed in 2001, but was later withdrawn when the Government made a commitment to legislate on the matter. As a result, a consultation on a proposed legal recognition of same-sex couples was published in 2003, and after its discussion, the Civil Partnership Act 2004 was finally enacted.

The responses to the 2003 Government’s consultation paper ‘Civil partnership: a framework for the legal recognition of same-sex couples’ provide interesting insights on the parameters of the debate on the issue, the main actors involved, and the arguments in favour and against the proposed legislation.

83% of the respondents to the consultation said they were in favour of same-sex civil partnerships. The majority of those against them were religious organizations, or individuals affiliated to religious organizations/groups.

One of the major issues of contention in the consultation appeared to be on whether legalized same-sex relationships should be ‘marriage’ or not. Many of those who supported the principle of a legal recognition of same-sex relationships advocated for a more inclusive definition of marriage (for example, Outrage, Queeryouth, and others whose position is anonymously reported in the response to the consultation), i.e. reformulate the notion of marriage to include both heterosexual and same-sex couples, rather than the creation of a new definition. Others supported the creation of ‘civil partnerships’ as a separate institution. Stonewall, for example, maintained that “civil partnership [should be] a separate legal structure, designed for same-sex couples, [with] no overlap in any way with marriage” (Stonewall 2004: 2).

For some, marriage is the ‘unique and natural’ relationship between a man and woman, hence the very notion of ‘gay marriage’ would be inconceivable. From this perspective introducing ‘gay marriage’ would have implicitly (and wrongly) meant that same-sex and heterosexual relationships ‘are on equal footing’. As the Christian Institute poignantly commented, “the proposals [for the recognition of same-sex unions equivalent to marriage] result in trashing marriage by equating it with gay liaisons [...]. [Marriage] will be replaced by the bogus concept of ‘new marriage’. It would be a clear rejection of Christian values. What is immoral is equated with the holy and honourable estate of marriage” (The Christian Institute 2003).

The marriage/partnership issue became a critical and highly contentious aspect in the parliamentary debates that followed the consultation. In the end, however, by adopting an alternative institution to marriage – civil partnership – the Government managed to avoid the likelihood of backlash to same-sex marriage, whilst at the same time, fulfilling its promise of equality by granting a legal status to committed same-sex couples (Stychin 2006). As the Government Minister Jacqui Smith explained in the House of Commons:

[W]e seek to create a parallel but different legal relationship that mirrors as fully as possible the rights and responsibilities enjoyed by those who can marry, and that uses civil marriage as a template for the processes, rights and responsibilities that go with civil partnership. (Hansard, Commons, 9 Nov 04, 776; quoted in Stychin 2006: 903)

**Comment**

A particularly interesting aspect of the Civil Partnership Act is the assumption that civil partnerships are sexual relationships. This specific ‘requirement’ was introduced to distinguish the category of ‘partnership’ from other ‘intimate categories’, such as ‘carers’, ‘siblings’, ‘friends’, etc. In fact, as Stychin points out, in the explanatory material and debates surrounding the Act, there is the assumption “that civil partnerships are sexual relationships, and that they are entered into by people who self-define as lesbian or gay (and lesbians do not form civil partnerships with gay men)” (2006: 906).

On the other hand, in the Act there is no provision for voidability on the grounds of lack of consummation. In this sense, the possibility that a same-sex relationship might involve ‘no sex’ is also recognized and introduced in the law. At the same time, the lack of this provision may suggest that consummation is by definition only a heterosexual penetrative act (see section 4.1.5 in this chapter) (Stychin 2006). To complicate matters even further, no provision is included in the Civil Partnership Act about the dissolution of the union on the basis of adultery. “Consequently, in the context of lesbian and gay civil partnerships, we are very much in a ‘grey area’ in determining when the parties are in a sexual relationship (with each other), and when they have committed adultery, and what the significance of adultery is for the partnership” (Stychin 2006: 907).

**4.5.5. If there is recognition, what does it entail? Rights and responsibilities?**

Apart from some minor differences, civil partnerships entail the same rights, duties and responsibilities as marriage. The two main differences are: 1) civil partnerships cannot be registered by means of a religious ceremony or in a religious building; and 2) in order to be valid, a civil partnership does not require consummation, unlike marriage.

**4.5.6. Are there fiscal benefits and privileges for registered same-sex partners– e.g. tax, social security and unemployment benefits, pensions and survivor benefits, carers’ allowances, inheritance rights?**

Civil partners benefit from the same privileges as married couples (see section 4.1.6).

**4.5.7. Are there social benefits and privileges for registered same-sex partners – e.g. access to social/ state housing; decision making in the event of illness or disability – i.e. next of kin recognition by hospitals?**

Civil partners benefit from the same privileges as married couples (see section 4.1.7).

**Comment**

It is relevant to mention here the case of Martin Fitzpatrick, who was told to leave the housing association flat where he used to live with his (same-sex) partner, after the latter died. “The Central London court to whom he took his claim rejected it in May 1996 and he subsequently asked the court of appeal to reconsider that decision” (Weeks, Heaphy and Donovan 1999: 690).

**4.5.8. Is there recognition of same-sex domestic violence, and are there policy initiatives to combat it?**

The Government acknowledges that domestic violence takes place in same-sex relationships. The most recent Home Office definition of domestic violence reflects this:

[Domestic violence:] any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality. (Home Office 2008; emphasis added)

Furthermore, the Domestic and Violence, Crime & Victims Act 2004 has extended the availability of injunctions against domestically violent perpetrators to same-sex couples, (Standley 2006).

A campaign, (see below) have also been launched by the NGO Broken Rainbow to tackle the less visible problem of same-sex domestic violence.

#### **4.5.9. Which terms were/are used to describe homosexuality in the law?**

In the Explanatory memorandum to the Equality Act (Sexual Orientation) Regulations 2007, a note is added specifying that “sexual orientation means an individual’s sexual orientation towards: people of the same sex as him or her (gay or lesbian); people of the opposite sex (heterosexual); or people of both sexes (bisexual).” The Civil Partnership Act 2004 uses exclusively the term ‘same-sex’ partner(s). ‘Homosexuality’ was included in the Local Government Act 1986, which “prohibited local authorities from intentionally promoting homosexuality or publishing material with the intention of doing so or from promoting teaching in schools of the acceptability of homosexuality” (see section 4.4.4 on Section 28 of the Local Government Act 1986). Lastly, as Moran points out, up until male homosexuality was decriminalized, further stigma was added by the lexicon used by the law which included ‘buggery’, ‘indecent assault’, and ‘indecent acts’ (1996).

## **4.6. Parenting and Reproduction**

### **4.6.1. How are mothers/ parents supported financially and socially by the state? (tax allowances, maternity leave, parental leave for fathers/ partners, for care of older children, child benefit, child care provision).**

There are several benefits to support parents with the extra costs of children. These include maternity benefits (for women who are pregnant or who have just given birth), benefits for the partners of women who have given birth, benefits for people who adopt, and various forms of financial support for the care of children.

- Financial benefits

A woman can get Statutory Maternity Pay if she has been working for the same employer for at least 26 weeks when the child is 15 weeks away from being ‘due’. The benefit is as much as the Lower Earnings Limit for National Insurance Contributions (Directgov 2008h).

Maternity allowance is for women who have been working but do not meet the requirements for Statutory Maternity Pay. The allowance is either 90% of the mother’s average earnings, or £112.75 a week, whichever is less. Maternity allowances can be provided for up to 39 weeks after the child is born (26 weeks, if the child was born before the 1 April 2007) (Directgov 2008i).

If a woman cannot get any of the above, she can still apply for other benefits, including the Incapacity benefit, Income support, or Jobseekers’ allowance (ibid.).

#### **Comment**

It is relevant to note that with the recent amendments introduced under Age Discrimination law (which results from implementing the new age discrimination legislation under a European Employment Directive), the age requirement of 16+ for

getting Statutory Maternity Pay has been removed for any woman expecting a child on or after 14 January 2007. The same 'rule', however, does not apply to Tax Credits, including Child Tax Credits (see below), for which the claimant must be 16 or over.

Statutory Paternity Pay can be obtained for two weeks during parental leave. Paternity pay can be claimed by a working father, or the partner (including a same-sex partner) of the woman having the child (Directgov 2008j).

The main benefits for children are: Child Benefit and Child Tax Credit. Child benefit is a tax-free monthly payment to anyone (hence not just biological parents) bringing up a child (under 16) or young person (aged under 20, if they are in full-time education). Most people who are bringing up a child or young person qualify for it because it does not depend on income or savings. The weekly rate for Child benefit for the oldest child is £18.10, and for other children £12.10.

Child Tax Credit is a payment for people (16 or over) with children, whether they are in or out of work. Anyone who is mainly responsible for a child can claim it. The amount one gets depends on various factors, including annual income.

Working Tax Credit is another benefit that may include a childcare element to help low income parents/people responsible for a child/children who are working and spending money on childcare.

Disability Living Allowance can also be claimed for disabled children who need help with personal care or have walking difficulties because they are physically or mentally disabled.

People receiving Income Support or income-based Jobseeker's Allowance and who receive maintenance for a child or children, may also be eligible for the Child Maintenance Bonus, if they registered for the scheme before 3 March 2003. The bonus is

£5 a week (up to a maximum of £1,000) and is paid as a one-off lump sum when the person finds employment. Under the new child support scheme, from 3 March 2003, the bonus has been replaced by a Child Maintenance Premium, which consists of up to £10 a week of any maintenance paid for the children.

(Directgov 2008k).

- Maternity Leave

Any woman who is working and is pregnant qualifies for maternity leave, regardless of how long she has worked for her present employer, and of how many hours per week she works. Maternity leave can start any time from 11 weeks before the child is due and can be up to 52 weeks. Furthermore, the mother is not allowed to work for the first two weeks after the birth (or the first four weeks if she works in a factory). During the first 26 weeks of maternity leave, the employer must continue to give the employee any contractual benefits she would normally receive. These may be terminated after the 26th week. Lastly, the employee can also agree with the employer to work up to 10 days during the maternity leave. These so-called ‘keeping in touch days’ can be used for training or other work-related activities (Directgov 2008e).

- Paternity Leave

Eligible employees are entitled to one or two weeks paternity leave. To qualify for paternity leave for a birth, one must: 1) be employed and have worked for the employer for 41 weeks by the time the child is due; and 2) be the biological father of the child, or be married to or be the partner of the child’s mother (this includes same-sex partners, whether or not they are registered civil partners<sup>131</sup>); and 3) have some responsibility for the child's upbringing; and 4) have given the employer the correct notice to take paternity leave (Directgov 2008l).

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<sup>131</sup> With the Employment Act 2002, paternity leave was extended to same-sex partners. The Act introduced statutory paid paternity leave rights to employees whose babies are expected to be born or are born on or after 6 April 2003.



- Flexible Working

Lastly, people responsible for children aged under six or disabled children under 18 have a right to request a flexible working pattern.

**4.6.2. What is the law about registering the birth of a child, and its parents? Who is the father (biological father versus partner of mother etc)? How important is biological versus social parenting, and has there been a debate about this?**

A newly born child must be registered within 42 days of the birth in England and Wales, and 21 days in Scotland.

If the child was born to a married woman, it is presumed to be the child of the married couple. Thus, either parent can register the birth of the child on their own<sup>132</sup> (Standley 2006). An unmarried father has no automatic parental responsibility arising from his being the child's natural parent. For this reason, only the mother has the duty to register the birth, and the registrar is forbidden from registering a person as the child's father, unless both parents attend together the registration. By registering as the father with the mother on the child's birth certificate, an unmarried father can acquire parental responsibility (ibid.).

As far as 'social parenting' is concerned, since 2005 a step-parent (by marriage or civil partnership) can have parental responsibility for a step-child by obtaining a parental responsibility order<sup>133</sup>. Other persons can obtain parental responsibility through a residence order, a special guardianship order, or by adopting the child (ibid.).

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<sup>132</sup> The presumption of parentage applies to "any child conceived or born during marriage, or born within the normal gestation period if the marriage is terminated by death or divorce" (Standley 2006: 273).

<sup>133</sup> In other words, after the Adoption and Children Act 2002 came into force in December 2005, a step-parent can acquire parental responsibility for their partner's (by civil partnership or marriage) child. This can be obtained with the agreement of the partner who is the natural parent, as long as he/she has parental responsibility (Standley 2006). Moreover, if the child's other parent also has parental responsibility, both parents must agree. It should be noted that having parental responsibility is not the same as being a parent.

**Comment**

Unmarried fathers have complained about not having ‘automatic’ parental responsibility. However, as the European Court of Human Rights held, this is not in breach of the European Convention for the Protection of Human Rights. In one case the Court ruled that “as the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family-based unit, the UK government had an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights” (Standley 2006: 284).

**4.6.3. What is the law concerning abortion? Give a brief history.**

Abortion is legal in Great Britain under the Abortion Act 1967, as amended, and Section 37 of the Human Fertilisation and Embryology Act (1990). However, in the UK, women seeking a termination do not have the legal right to abortion on request. They must have grounds under the Abortion Act, and the decision is ultimately taken by two registered medical practitioners (or one, in cases when it is immediately necessary to save the woman’s life). Doctors have to form their opinion in good faith so that an abortion is justified within the terms of the Act, and in the light of clinical judgment of all the particular circumstances of the individual case. They may also take into account the pregnant woman’s actual or reasonably foreseeable environment, which include her personal and social situation.

A woman under the age of 16 can have an abortion without her parent's consent, on the condition that: 1) the doctors are satisfied that the person in question understands the decision, and 2) that it would be in her best interests to have an abortion without parental consent.

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For a step-parent to become a parent, they would have to adopt the child (Standley 2006; Women and Equality Unit 2005).

An abortion may be carried out up to 24 weeks on condition that: 1) the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman; and/or 2) the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of any existing child(ren) of the family of the pregnant woman. Abortion is also allowed after 24 weeks if: 1) it is necessary to prevent grave physical and mental injury to the woman, 2) the continuance of pregnancy would put the woman's life at risk, and 3) there is evidence of severe foetal abnormality.

The 1967 Abortion Act only applies to England, Scotland and Wales<sup>134</sup>. In Northern Ireland, on the other hand, abortion can only be obtained if the woman's life is at risk, and in some cases of foetal abnormality.

(Abortion Rights 2008; Directgov 2008m; NHS Direct 2008)

- Historical overview

The first references to abortion in English law go as far back as the 13th century, when termination of pregnancy was acceptable until so-called 'quickening', the time when the soul was believed to enter the foetus. In the 19th century more stringent abortion laws were passed that also removed the distinction between before and after 'quickening'. In 1861, the Offences Against the Person Act punished performing an abortion or trying to self-abort with the death penalty. The Infant Life Preservation Act of 1921 created the crime of 'killing a viable foetus' (28 weeks +) in all cases, even when the pregnant woman's life was at risk. It remained unclear whether termination of pregnancy before 28 weeks was legal or not.

Due to such restrictive regulations, many women resorted to non-professional abortionists, often damaging their health or dying. Abortifacients cures were often advertised on newspapers, disguised under the term 'menstrual blockages'. In many instances they were ineffective but also highly poisonous. Concern with the loss of

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<sup>134</sup> In recent years Guernsey, Jersey and the Isle of Man have also introduced their own similar legislation.

women's lives and health caused by these means and by illegal abortions became the central issue of discussion in the 1934 Conference of Co-operative Women, at the end of which a resolution was passed calling for the legalisation of abortion. The Abortion Law Reform Association was established in 1936 to campaign on this issue.

In 1940 after a doctor was acquitted of having performed an illegal abortion due to the life-threatening situation of the patient, some women were able to get a safe abortion, but this remained restricted to very few, often wealthy women. Support for a reform in the legislation grew after WWII, but it was only in 1967 that the Abortion Act became law, legalising abortion under certain conditions. Since then, 'pro-life' campaigners have repeatedly tried to challenge the Act, to restrict access to abortion. The National Abortion Campaign (NAC) was funded in 1975 to protect the Act.

In 1990, the Human Fertilisation and Embryology Act amended the 1967 Act by lowering the legal time limit for termination of pregnancy from 28 to 24 weeks, and clarified the circumstances under which abortion could be obtained at a later stage.

In January 2004, the Government announced a review of the 1990 Human Fertilisation and Embryology Act to update it in view of developments in reproductive medicine. After public consultation and a White Paper, a draft Bill was published in May 2007 for scrutiny by a Joint Committee of both Houses. Although the Bill is not directly addressing abortion, pro-choice organizations, with Abortion Rights<sup>135</sup> at the forefront, were worried that discussions in Parliament would lead to anti-abortion amendments, including the reduction of the abortion time limit from 24 weeks to 22, 20 or even 13 weeks; and the imposition of a reflection period and compulsory counselling for all women seeking abortion. After an impassionate debate in the House of Commons on 20th May 2008, supporters of a reduction of the time limit were defeated, thus abortion will remain legal for up to 24 weeks.

(Abortion Rights 2008; Education for Choice 2008).

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<sup>135</sup> Abortion Rights is a pro-choice organization that resulted from the merging of the National Abortion Campaign and the Abortion Law Reform Association in 2003.

#### **4.6.4. Is there policy/ public debate around teenage pregnancy?**

Teenage pregnancy has been a national public health issue in the UK since the 1990s. It is often talked about in alarmed tones, both at the governmental level and by the media. As Duncan points out, the policy understanding of teenage parents as a social problem has been linked with the wider ‘social threat’ and moral panic discourse in the public debate (2005). Teenage pregnancy is seen as an indicator of the ‘breakdown of the family’, even though rates are now much lower than in what is often described as ‘golden age’ of the family of the 1950s (ibid.). Similarly, Lawlor and Shaw claim that fears about teenage rates of pregnancy on the increase in Britain are unsubstantiated, and they result in a ‘manufactured risk’ that has more to do with moral panic than with public health (2004).

In 1999 the Government’s Social Exclusion Unit published a Teenage Pregnancy Report which set out a Teenage Pregnancy Strategy to try and tackle the issue. The aims of the strategy are: 1) to halve pregnancy rates among under-18 in England by 2010, and establish a downward trend in the under-16 rate; and 2) to increase the proportion of teenage parents in education, training or employment to 60% by 2010, in order to reduce their risk of long-term social exclusion.

To achieve these targets, all local areas have a 10-year strategy in place. Local delivery is also supported by two national media campaigns: “RU Thinking” (image below) and “Want Respect? Use a Condom”. The former is aimed at younger teenagers, promoting messages on delaying their first sexual encounters and avoiding peer pressure. “Want Respect? Use a Condom” is aimed at sexually active young people promoting condom use.

#### **4.6.5. Is there policy/ public debate around delayed motherhood?**

The number of British women aged over 40 who are giving birth has more than doubled in the past decade. Negative portrayals of older mothers in the media are quite common, and often tend to imply that delayed motherhood is selfish and a violation of the “natural order” (Alldred 1999).

In 2006, the Institute for Public Policy Research (IPPR) published a study on population politics urging the Government to appoint a minister with responsibility for tackling Britain's “baby gap” (teenage and delayed pregnancy), however, no particular policy has been produced by the Government on this matter (Dixon and Margo 2006).

#### **4.6.6. Is there any policy/ legislation defining an ‘appropriate’ age for motherhood?**

I have not found any governmental document explicitly mentioning an ‘appropriate’ age for motherhood. However, in relation to adoption, for example, some local authorities maintain that “adopters should be of a reasonable age to be a parent” (Leicester County Council 2008). This phrasing is rather unclear, in that it is not specified what the ‘reasonable age’ to be a parent may be. Others specify that there should be a maximum age gap between adoptive parent and child. For example, the London Borough of Richmond states, “although there is no upper age limit, we would not usually expect there to be more than about a 40 year age gap between the child and their adoptive parents. However, any age gap will be considered in the context of the needs of the individual child” (London Borough of Richmond 2004). Similarly, Be my Parent, the UK-wide family-finding service provided by the British Association for Adoption & Fostering (BAAF), states in its website that, “although there is no upper age limit, most agencies would consider an age gap of up to 45 years between the child and adoptive parent. However, this is not inflexible, depending on what you are offering in relation to the needs of waiting children. The average age of an adopter in the UK is 38 years old” (Be

my Parent 2008).

As far as IVF treatments are concerned, the Human Fertilisation & Embryology Act states that there is no upper age limit on couples receiving IVF treatment, but specifies that before providing any woman with treatment, centres must take into account the welfare of the child that may be born as result. The National Institute for Health and Clinical Excellence (NICE) has set 23 as the lower age limit for offering IVF, and 40 as the maximum. These limits are applied by NHS PCTs, hence treatment for women over 40 is available only privately. Many private clinics seem to adhere to the British Fertility Society recommendation of 50 as the upper age limit, but others are reportedly more flexible in this respect (The Telegraph 2006; Laurance 2005).

#### **4.6.7. How is adoption and fostering regulated? (by the state or private agencies?)**

Adoption is regulated primarily by the Adoption Children Act 2002. Adoption agencies (local authorities or approved agencies) have the responsibility for making all the required arrangements, including providing counselling, advice and information about the adoption process. In some instances, adoptions can also be carried out without agencies. These are adoptions by relatives, step-parents and private foster-parents (Standley 2006).

#### **4.6.8. Who can adopt (married couples, single women/ men, cohabiting couples, same-sex couples)? Is there adoption leave?**

In order to be eligible to adopt a child, a person must be over 21. In theory, there is no upper age limit (however, see section 4.6.6). A single person, or one partner in an unmarried couple – heterosexual, lesbian or gay – can adopt. Since December 2005, married and unmarried couples (same or opposite sex) in England and Wales can also apply to adopt jointly. Furthermore, adoption agencies are favourably inclined to place adoptive children with people/ a person who reflect their ethnic and racial identity as

closely as possible (BAAF 2008; see also Hayes 1995 for the debate against transracial adoption in the UK).

As far as adoption leave is concerned, an adoptive parent may be entitled to adoption leave if she/he has worked for an employer for at least 26 weeks ending with the week in which he/she received notification that they have been matched with a child for adoption. In case of adoption from overseas, the adoptive parent must have worked for an employer for at least 26 weeks by the end of the week in which they receive official notification, or from the day they started working for the employer. Adoptive parents are entitled to up to 52 weeks' adoption leave. Most parents are also entitled to Statutory Adoption Pay. This is paid at a flat rate of £112.75 a week, or 90 per cent of the normal weekly earnings, whichever is lower.

In the case of fostering, as the Government's website Directgov states: "Anyone can apply to be a foster carer, so long as they have the qualities needed to look after children who cannot live with their parents. There is no maximum age limit for being a foster carer."

(Directgov 2008n)

#### **Comment**

The Fostering Network, which claims to be the UK's leading charity for everyone involved in fostering, has been carrying out a number of campaigns to improve the provisions which are currently made to foster parents. One of the issues it has been campaigning for, for example, is the introduction of consistent and fair allowance payments for foster carers (currently each local authority is left to determine allowance rates for itself).

In April 2008 the Network published a policy paper, based on a long period consultation with foster carers, social workers and other key professionals across the UK. It argues that:



“we are moving towards a professional foster care service and that, as we do so, we need to understand what it means to be a professional foster carer. We make the case for why foster carers should be regarded as professionals, and put forward recommendations for how the foster carer role needs to be better supported, enhanced and recompensed if foster carers are truly to be recognised as key partners in the team surrounding the child and valid members of the children’s workforce.” (The Fostering Network 2008: 3).

#### **4.6.9. Does the state provide access to assisted conception (donor insemination, IVF etc)?**

The UK has introduced legislation on the provision of assisted conception services with the Human Fertilisation and Embryology Act 1990, and the Human Fertilisation and Embryology Authority (HFEA) Code of Practice<sup>136</sup>. Together they regulate which services are permitted and who may avail themselves of them.

In theory, some assisted conception services should be accessible through the National Health Service (NHS), including: intrauterine insemination (IUI); in vitro fertilisation (IVF); intracytoplasmic sperm injection (ICSI); IVF using donated eggs or sperm, provided donors are available.

The difference in criteria used by each primary care trusts (PCTs) means that availability of these treatments on the NHS varies greatly across the UK. As reported by the BBC, according to the Infertility Network UK, getting treatment on the NHS is still a ‘postcode lottery’, with waiting lists up to four years (BBC 2008d). Moreover, most fertility clinics (even those located on NHS premises) only offer fee-paying treatment services. The cost varies greatly from clinic to clinic, for IVF it can rise up to around £3,000 per treatment cycle.

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<sup>136</sup> The Human Fertilisation and Embryology Authority (HFEA) was established by an Act of Parliament to regulate the activities covered by the Human Fertilisation and Embryology Act 1990.

#### **4.6.10. If so, for whom (married couples, single women, cohabiting heterosexual couples, lesbian couples)?**

Major changes in who can access assisted fertilization are likely to be introduced in the Human Fertilization and Embriology Act by the end of summer 2008, following the House of Commons' vote to amend existing legislation in May 2008. Until the new regulations are implemented, the only constraint posed by the Human Fertilization and Embriology Act, with regards to regulations of who can benefit from assisted conception services, is that before providing such services, account must be taken of the welfare of the child. More specifically:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father) and of any other child who may be affected by the birth. (HFE Act)

The 'need for a father' is one of the most controversial parts of the Act because it made it more difficult for single mothers and lesbian couples to access assisted conception services (Almack 2006). Although some small-scale studies suggested that discrimination on the grounds of marital status and sexual orientation is becoming less widespread than it used to, it is evident that access to treatment for these groups still remains problematic (Langdridge and Blyth 2001). In 2006, the British Fertility Society, the organisation representing professionals working with assisted conception, published the result of a survey it conducted on fertility clinics in England (British Fertility Society 2006). The study showed a wide disparity in access to NHS fertility treatments, with many more difficulties encountered by single women and same-sex couples, who, as a result often have to resort to private clinics.

In addition to the limitation imposed by the 'need for a father' requirement of the Act, there are also other disparities in the social criteria used for acceptance to both NHS-funded or private programmes. Some only treat couples with no children, some only

those with no children on the maternal side, others only those who have no children living at home. Some also have an upper age limit, although none is set by law, or by the HFEA.

**Comment**

On 20 May 2008 the House of Commons rejected attempts by Conservative MPs to ensure that IVF providers take into account a child's need for a father and mother when deciding whether to provide treatment. MPs also rejected the attempt to introduce the need "for a father or male role model" in the Act, and eventually voted for an amendment which will allow women seeking fertility treatments not to take into account the role of a father or male figure. The Act will be replaced with references to the need for "supportive parenting".

In the course of the House of Commons debate, the Conservative MP Ian Duncan Smith made a strong case for the government bill to be amended to recognise the role of fathers, or at least, and importantly, the role of a relevant male figure. As he reportedly stated: "we want people to recognise that fathers have a major role to play and if they're not around let's find a way of making sure their influence can be found" (Watt 2008). Similarly, another Conservative MP reportedly claimed: "we're not insisting that any single woman or lesbians do not have IVF treatment. The only thing we're saying is there should be some father figure somewhere. It may be a grandfather, it may be a relative. A lot of single parents depend on father figures. It is just pure common sense" (Watt 2008).

**4.6.11. Is there legal regulation of private provision of assisted conception? If so, what is the nature of the regulation?**

In the UK it is possible to obtain assisted conception services privately. There are a number of HFEA-licensed clinics across the country. All are bound by the HFEA Code of Practice, and inspected on a regular basis to ensure that they provide safe and appropriate services.

As mentioned previously, every clinic is allowed to set their own criteria for whom they will treat and also the typology of services provided. Research conducted for this report suggests that, apart from some set requirements (ensuring the well-being of the child, confidentiality, etc), private clinics (but also PCTs) are given significant freedom to make independent decisions on how to deliver their services.

#### **4.6.12. What is the law concerning surrogacy?**

Surrogacy is governed by the Surrogacy Agreement Act 1985. The Act specifies that surrogacy agreements between consenting adults are permitted, but it is illegal to set up a ‘surrogacy agency’, or to arrange surrogacy for money other than ‘reasonable expenses’.

Under the Act, the birth mother is the legal parent of the child until legal parentage is transferred to the ‘commissioning parents’. It is important to note that, at present, a surrogacy arrangement is not recognized as a binding agreement by law. This means that if a surrogate mother refuses to comply with the surrogacy arrangement, there is very little the commissioning parents can do, because she still is the gestational mother, even when the child is genetically related to one or both intended parents and not the surrogate mother herself.

#### **4.7. *Homosexuality and Anti-Discrimination Legislation***

##### **4.7.1. Is there law against discrimination on the grounds of sexuality/ against lesbians and gay men? Does it relate to employment, the provision of goods and services etc?**

The principal pieces of legislation governing sexual orientation discrimination in the UK are:

- The Employment Equality (Sexual Orientation) Regulations 2003.

This is the law against sexual orientation discrimination at work. It covers recruitment, terms and conditions, pay and benefits, status, training, promotion, transfer opportunities, redundancy and dismissal.

- The Equality Act (Sexual Orientation) Regulations 2007.

This legislation introduces measures providing protection from sexual orientation discrimination outside the workplace, on par with the protections provided on grounds of sex, race and religion or belief. The Act outlaws discrimination in the provision of goods and services, in the exercise of public functions, in education, and in the rental or sale of properties.

Amongst the regulations included in the Act, an exemption is made for religious organisations for whom complying with the law could conflict with either their doctrine and/or the views of its followers. This exemption does not apply when a religious organisation provides a public service. For this reason, faith-based adoption and fostering agencies that in principle do not support same-sex parenting will have to abide by the regulations (although they were also given until the end of 2008 to adjust to them). In the mean time, any agency wishing to take advantage of the transitional arrangements will have to refer prospective same-sex adoptive parents to agencies who are able to assist (Stonewall 2008c).

**Comment**

In July 2008, an employment tribunal in north London ruled that a marriage registrar was discriminated against on grounds of religious beliefs, when allegedly bullied into performing civil-partnerships which she believes to be sinful and against God's will (BBC 2008e). While she claimed that this was a victory for religious liberty, gay rights organizations, including Stonewall, worriedly commented that the tribunal decision (currently under appeal) "set a precedent that will allow people with strong religious convictions to opt out of the provision of services to gays, lesbians and bisexuals" (Grew 2008, *Pinknews*). Gay rights campaigner Peter Tatchell said the ruling was a victory for the right to discriminate, and added: "public servants have a duty to serve all members of the public without fear or favour. Once society lets some people opt out of upholding the law, where will it end? (BBC 2008e).

**4.7.2. Is there recognition of the problem of anti-gay violence/ hate crimes? Are there policy initiatives to combat it?**

In October 2007 the Justice Secretary announced that a 'new offence of incitement to hatred on the grounds of sexual orientation' would be introduced in the Criminal Justice and Immigration Bill. In January 2008, the House of Commons approved the Bill, which then received Royal Assent in May 2008 after highly animated debates in the House of Lords (Grew 2008b, *Pinknews*).

Since its proposal, Christian groups expressed their opposition to the Bill claiming that it would be used to censor the expression of religious beliefs. For example, the Catholic Bishop's Conference of England and Wales commented: "sexual activity and lifestyle, as distinct from sexual orientation, are matters of choice and impinge upon the public sphere. As such they are subject to evaluation and criticism, and freedom to discuss them must be preserved" (Catholic Communications Network 2007).

## **4.8. *Immigration and Intimate Relationships***

### **4.8.1. Is there a right to “family reunion”?**

Yes. In the UK immigration-law context, ‘family reunion’ is used when a person (together with his/her dependent child/ren under 18) applies to join someone already in the United Kingdom who has been granted refugee status or humanitarian protection as their husband, wife, civil partner, unmarried partner (since 1997), or child under 18. Other dependent relatives (such as parents) do not qualify under ‘family reunion’. However, they may be allowed to enter the UK if there are exceptional compassionate circumstances (Home Office, UK Border Agency 2008a).

More generally, those who have a right to live in the United Kingdom (not as refugees or asylum seekers) may also be joined by their family. A family in this context is defined as: spouse<sup>137</sup> or civil partner; children or grandchildren who are under 21 years of age, or who are dependent upon the person already in the UK; the parents or grandparents of the person already in the UK, or of the spouse or the civil partner. If the person already in the UK is a student, only the spouse, civil partner or dependent children are entitled to a right of residence. Other relatives, including brothers, sisters and cousins do not have an automatic right to live in the United Kingdom. To be considered, they must be able to demonstrate that they are dependent on the person already in the UK (Home Office, UK Border Agency 2008b).

### **4.8.2. What is the law/policy about immigration for the purposes of marriage?**

The British Nationality Act 1981 specifies that a non-British person who married (or is civil partner of) to a British citizen does not automatically acquire British citizenship, but can apply for naturalization under certain conditions. Moreover, unless immigration officials consider the marriage/civil partnership to be purely for the purpose of being able

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<sup>137</sup> It should be noted that the Immigration Act 1988 prohibits polygamous wives from exercising their right of abode when another wife of the same husband has already been granted that right.

to legally enter the UK, the non-British spouse/civil partner of a British national is able to live, enter and leave the UK (Standley 2006). The non-British spouse/civil partner is at first allowed to stay and work in the UK for two years. Near the end of this time, she/he can apply to stay permanently in the UK (if she/he is still married with/civil partner of the British national) (Standley 2006).

Also relevant to migration policies and marriage are regulations to prevent so-called 'sham marriages'. The latter occur when a non-UK national who is already in the UK as illegal migrant, asylum seeker or with no settled immigration status, enters a marriage solely for the purpose of improving his/her chances of being allowed to remain permanently in the country (Standley 2006). In order to prevent this practice, the Asylum and Immigration (Treatment of Claimants etc) Act 2004 has introduced new restrictions on marriage. These require that when one of the parties to the marriage is under immigration control, the marriage must be solemnised in any of the various jurisdictions of the United Kingdom. In this way, the registrar must ensure that the person has an entry clearance granted expressly for the purpose of enabling him/her to marry in the United Kingdom or has other official authority to the same effect (Standley 2006).

#### **4.8.3. Do unmarried and same-sex couples have the right for the non-national partner to immigrate?**

Under the British Nationality Act 1981, it is more difficult for a non-British partner of a British citizen to obtain British citizenship, compared to married couples or civil partners. It should be noted that, under UK immigration law, to qualify as 'partners' a couple (same-sex or opposite-sex) must have lived together for more than two years<sup>138</sup>.

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<sup>138</sup> The fact that same-sex unmarried couples are now eligible for British residency is the result of the lobbying of the Stonewall Immigration Group in the 1990s (later renamed: the UK Lesbian & Gay Immigration Group). Before the national elections of 1997, the group obtained the commitment of the Labour Shadow Home Secretary to, if elected, recognise gay and lesbian relationships for immigration purposes. In October 1997 the Unmarried Partners Concession was announced, making it possible for same-sex partners to make application for the foreign partner to remain in the United Kingdom, if they had lived together for four years. In June 1999 the Unmarried Partners Concession was amended to reduce the cohabitation period to two years. In 2000 the concession became an Immigration Rule (UK Lesbian & Gay



As far as the ‘right-to-stay status’ is concerned, the non-British partner can get a permission to stay and work in the UK for two years. Near the end of this time, she/he can apply to stay permanently in the UK, if she/he still intends to continue living together with her/his partner.

Interestingly, there are specific regulations for fiancés, fiancées or proposed civil partners. These can be allowed to stay in the UK for six months, but without permission to work. When they get married or enter a civil partnership, the non-British national can apply for a two-year extension to their visa and, if the application is granted, they will be allowed to work. Near the end of this time, she/he can apply to stay in the UK permanently.

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Immigration Group 2008; Stonewall 2008). While this is an improvement in previous regulations on this matter, it was recently brought to my attention the case of a French lesbian woman whose Singaporean partner is not allowed to come to UK as her partner, because they have not lived together for two years. As immigration regulations make it impossible for the couple to actually live together (either in Europe or in Singapore), the two are caught in a vicious circle, whereby they are denied the right to re-unite as a couple, and are forced to maintain a very expensive and emotionally draining long-distance relationships.

## **4.9. *Single people and Solo Living***

### **4.9.1. Is there any public/ policy debate about the rise in solo living?**

The rise in solo living in the UK is one of the most important demographic shifts of recent decades (Bennett and Dixon 2006). It is also often talked about in the media as a threatening trend: solo living is an ‘eco-treat’ in that, reportedly, one person-households consume more energy and create more waste than shared households (Moore 2006). Furthermore, solo living allegedly increases health problems by favouring ‘bad habits’, such as smoking or over-drinking (BBC 2006), etc.

Recently, academic and policy institutes’ reports and studies started to raise other important policy issues related to this upward trend. For example: the financial pressures put on individuals who live on their own and do not share household costs; the limited affordable opportunities offered by the housing market to solo-living people; how community cohesion policies should be more responsive to the increase in solo-living arrangements; or the mental health and wellbeing of older people living on their own (Allen 2008; Anderson and Morgan 2007; Bennett and Dixon 2006; Victor et al 2005).

### **4.9.2. Is there any social/ public housing provision for single people?**

There is no special social housing provision for single people (apart from the single person 25% discount on Council Tax bills<sup>139</sup>). On the contrary, as a recent Joseph Rowntree Foundation study pointed out, despite the increase in single-person households, single people fare least well in allocations of social housing (Bennett and Dixon 2006). Demand continues to outstrip supply and single people are considered a low priority for housing, unless they are vulnerable, or have special medical or social welfare needs (Anderson and Morgan 2007; *ibid.*).

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<sup>139</sup> The Council Tax, based on property value, was introduced in 1993 by the Conservative Government to replace the very unpopular ‘Poll tax’.

#### **4.10. (Trans)gender Recognition**

##### **4.10.1. What is the legal situation regarding trans people? Is there provision to register a person's "new gender", for instance, by changing birth certificates and passports? What is required (i.e. surgery?) to achieve recognition of "new gender"?**

The most recent and significant piece of legislation regarding transgender people is the Gender Recognition Act 2004, which came into effect in April 2005. For the first time the Act gave transgender people full legal recognition of change of gender and enabled them to apply for legal recognition of their acquired gender (Standley 2006).

Legal recognition is obtained after a Gender Recognition Certificate is issued by a Gender Recognition Panel. The Panel was set up under the Recognition Act 2004 specifically to assess applications from transsexual people for legal recognition of the gender in which they intend to live. For an application to be successful, the Panel must be satisfied that the applicant: 1) has, or has had, gender dysphoria; 2) lived in the acquired gender throughout the preceding two years; 3) is at least 18 years of age; and 4) intends to continue to live in the acquired gender until death<sup>140</sup> (Gender Recognition Act 2004).

When a gender recognition certificate is issued, the person's gender becomes for all purposes the acquired gender, and this will be recognized legally. Concretely this means that the person is entitled to a new birth certificate, and his/her old gender identity will be revoked, including the transferring of all medical records. Moreover, the successful applicant has the right to marry in his/her acquired gender (Gender Recognition Act 2004).

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<sup>140</sup> Hence, surgical intervention is not a requirement to obtain a certificate.

#### **4.10.2. What body/ institution has the authority to deal with transgender issues?**

The Ministry of Justice is responsible for advising on policy on the Gender Recognition Act. The Gender Recognition Panel, which is part of the Tribunals Service, is responsible for deciding on applications to change gender and issuing Gender Recognition Certificates. The Department of Health (DH) allocates the money for funding the treatment of all conditions, including gender reassignment procedures, which are provided by PCTs (but also privately).

#### **4.10.3. Is there anti-discrimination legislation regarding trans people?**

Anti-discrimination legislation regarding trans people is regulated by the following Acts:

- the Sex Discrimination Act 1975, which provides legal protection on many grounds, including on the grounds of gender reassignment;
- the Data Protection Act 1988, which states that transsexual identity and gender reassignment constitute ‘sensitive data’ and must be processed as such;
- the Sex Discrimination (Gender Reassignment) Regulations 1999, which protects transsexual people against discrimination in employment and vocational training;
- the Equality Act 2006, which places a statutory duty on public authorities to eliminate unlawful discrimination and harassment. The Act also specifically refers to discrimination against people who intend to undergo, are undergoing or have undergone gender reassignment.

#### **4.10.4. Does the health service provide gender reassignment surgery? Is it free? How is it accessed?**

The NHS is legally required to fund treatments for gender reassignment procedures. Generally, a trans person should be able to obtain funding for: specialist psychiatric assessment and hormonal medication. Some PCTs also fund hair removal and speech therapy. However, when it comes to surgery, PCTs usually limit this to what are called

‘core procedures’ – funded – and ‘non-core procedures’ that may be deemed ‘cosmetic’ or ‘aesthetic’, hence not funded. The latter include, for instance, facial feminising surgery and breast augmentation, despite the fact that this surgery may be perceived as essential to the success of the transition to the new gender role. (The exclusions of such types of surgery apply to anyone, whether or not they are a transsexual person). On the other hand, chest reconstruction for a trans man is likely to be regarded as ‘core’ surgery.

In order to be able to start the care pathway to cure gender dysphoria, the first step is to contact the GP and obtain a referral to a local psychiatrist. The latter should then make a referral to a gender identity clinic or to a private gender specialist approved by the PCT. If the assessment made at the clinic is positive, another referral is made to a surgical unit. The process is very long, and may take up to more than two years. If funding is not obtained, it is still possible to resort to private clinics. The price for gender reassignment procedures in this case is very expensive (for a vaginoplasty surgery, for example, costs are around £10,000).

(NHS 2008; Brighton & Hove City PCT 2007).

**4.10.5. Is there a law regulating the act of naming? To what extent are names gendered? Are there restrictions to the names accessible to transgender people based on gender?**

No relevant information was found on this matter.

## **4.11. Care**

### **4.11.1. Is there any policy/ public debate about care, particularly the “care deficit”?**

Mahon argues that “the emergence of the dual earner family challenges states to take on new responsibilities as families can no longer provide full time care, nor can they afford to rely exclusively on markets.” (2002: 344). In the past decade, the issue of care, and particularly the ‘care deficit’ have been matters of public debate in the UK, often associated with discussions over changing family structures, increasing economic independence of women, and the need for more social policies aimed at lessening familial or individual’s caring burden (Joseph Rowntree Foundation 2006).

To address some of these issues, the Labour Government has passed a number of Acts to regulate care practices and carers’ rights. For example, the Carers (Equal Opportunities) Act 2004 places a duty on local authorities to ensure that carers<sup>141</sup> are aware that they are entitled to an assessment of their needs. It also promotes better joint working between councils and the health service to ensure improved services to carers.

Despite these and other care-related policies (for example on child care) introduced by the Labour Government, some scholars (Williams 2001, at alia) have criticized the rationale behind such policies, claiming that it is centered around a narrow ethic of paid work, rather than a ‘political ethics of care’. In this respect, a recent study showed that a number of voluntary organizations directly involved in service provision in the areas of parenting, partnering and child welfare, believed that social policies undervalue caring activities, and this needs to be addressed with a renewed prioritization of the provision of practical support to carers (Williams and Roseneil 2004).

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<sup>141</sup> Under the Act a carer is a person who provides care to another person and is not paid for providing that care.

**4.11.2. What rights, if any, do people have for (paid or unpaid) leave from work to care for children, partners, family members/ elderly parents, friends?**

(See also section 4.6.1). Any woman who is working and is pregnant qualifies for paid maternity leave, regardless of how long she has worked for her present employer, and of how many hours per week she works. Maternity leave can start any time from 11 weeks before the child is due and can be up to 52 weeks (Directgov 2008e).

Eligible employees are entitled to one or two weeks paternity leave. To qualify for paternity leave for a birth, one must: 1) be employed and have worked for the employer for 41 weeks by the time the child is due; and 2) be the biological father of the child, or be married to or be the partner of the child's mother (this includes same-sex partners, whether or not they are registered civil partners<sup>142</sup>); and 3) have some responsibility for the child's upbringing; and 4) have given the employer the correct notice to take paternity leave (ibid.).

Moreover, people responsible for children aged under six or disabled children under 18 have a right to request a flexible working pattern. Since April 2007, with the Work and Families Act 2006, any carer has a statutory right to ask their employer for flexible working if she/he cares for an adult who is a relative or lives at the same address (Directgov 2008f). Carers also have the right to take (unpaid) time off work when there is an emergency relating to the person they care for. There is also a 'carer's allowance' for people aged 16 or more who spend at least 35 hours a week caring for a person who is a recipient of one of the following: Attendance Allowance, or Disability Living Allowance, or Constant Attendance Allowance. The weekly carer's allowance amounts to £48.65. This may be reduced if the carer receives other benefits, including State Pension (Directgov 2008g)

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<sup>142</sup> Paternity leave was extended to partners in a same-sex couple with the Employment Act 2002. The Act introduced statutory paid paternity leave rights to employees whose babies are expected to be born or are born on or after 6 April 2003.

## **4.12. Tissue and Organ Donation**

### **4.12.1. Are there restrictions on who can donate bodily tissue and organs to whom? (i.e. family members)**

Regulations on who can be a donor or recipient of bodily organs and tissues are included in the Human Tissue Act 2004 which came into force in September 2006 in England, Wales and Northern Ireland. Its purpose “is to provide a consistent legislative framework for issues relating to whole body donation and the taking, storage and use of human organs and tissue” (Human Tissue Act 2004).

- Living donations

Before this Act was passed, organ donations were regulated by the Human Organ Transplant Act 1989 which made it an offence to transplant an organ from a living donor into another person, unless the donor and recipient were genetically related to each other, i.e. one of the following: biological parents, children, siblings (including half siblings), and nephews and nieces (Choudry, Daal et al. 2003). However, the Human Organ Transplants (Unrelated Persons) Regulations 1989 made special provision for cases of transplants between living persons who were not genetically related. The Regulations lifted the prohibition against unrelated living donation, provided that the donations were un-coerced, unpaid for, and agreed by the Unrelated Live Transplant Regulatory Authority (ibid.).

With the arrangements introduced by the Human Tissue Act 2004, the Human Tissue Authority<sup>143</sup> (HTA hereafter) claims that it is now much easier to donate organs, especially in the case of non-directed<sup>144</sup> donations between unrelated persons (HTA

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<sup>143</sup> The new institution responsible for approving all organ transplants from living donors.

<sup>144</sup> A non-directed donation is between two genetically unrelated strangers, whereas a directed donation is between genetically unrelated people who are emotionally close. The terms ‘emotionally close’ and ‘emotionally tied’ are not used in the text of the Human Tissue Act 2004 itself, but appear in the literature produced by the British Medical Association (2006) and HTA (2006) to describe and comment on the Act.



2006a). More specifically, the HTA set up a system to allow more flexibility in non-directed altruistic donation and paired donation<sup>145</sup> from living donors (ibid.).

- Deceased organ donation

As far as deceased organ donations are concerned, in the UK if the deceased person had not given consent before death, this could be sought from a ‘qualifying relative’. In order of priority these may be: (a) spouse or partner; (b) parent or child; (c) brother or sister; (d) grandparent or grandchild; (e) child of a person falling within paragraph (c); (f) stepfather or stepmother; (g) half-brother or half-sister; (h) friend of longstanding (HTA 2006b).

**Comment**

As reported by the BBC in 2006, the UK has one of the lowest deceased organ donations rate in Western Europe, “because grieving relatives are reluctant to allow such procedures” (BBC 2006c). In January 2008, writing on the Telegraph, the Prime Minister proposed to introduce a new ‘opt-out’ system which would mean that consent for organ donation after death would be automatically presumed, unless individuals had opted out of the national register or family members objected (Brown 2008).

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In both cases the meaning of ‘emotionally close’ is not specified, although it intuitively seems to refer to spouses, partners and friends.

<sup>145</sup> A non-directed altruistic donation is when a person donates an organ to someone they have never met. Paired donation is when a donor and recipient whose blood groups or tissue types are either mismatched or incompatible are paired with another donor and recipient who are in the same situation (HTA 2006).

### **4.13. Conclusions**

Drawing from primary and secondary sources, this chapter has presented: contemporary UK policies with respect to a number of indicators of intimate citizenship, the contexts in which many of these legal and social provisions were made, and some comments on most recent events concerning the regulation of intimate lives in the country.

One of the aspects that emerges from the exploration of these issues, is the considerable extent to which policies regarding intimate citizenship in the UK have changed in the past forty years. One only needs to consider that up until recently, many laws and policies regulating intimate lives were based on and perpetuated gendered legal subjecthoods, whereby women were treated as subordinate to men. A clear illustration of this, as Fredman argues, “was the legal sanctioning of violence and rape against married women” (2002: 52). It was only under the impetus of the women’s movement in the UK that the traditionally gendered regulation of intimate life started to be challenged to its roots. As this chapter has shown, the passing of the 1975 Sex Discrimination Act marked a great success in this respect. However, it took many years and amendments after the Act was passed before equality between men and women was fully implemented – although not always achieved – in the public sphere. As far as rape in marriage is concerned, this was criminalised as late as 1982 in Scotland and 1991 in England, Wales and Northern Ireland. Until then, the marital powers ascribed to a husband meant, quite simply, that his wife was his own property and that she could not step away from her ‘duties’ towards him.

Other crucial developments of the past decades have been the decriminalization of male homosexuality, the introduction of legislation against discrimination on grounds of sexuality, and the recognition and institutionalization of same-sex relationships. This chapter has discussed some of the landmark, and most contested, changes in this area: the decriminalization of male homosexuality in 1967, the equalization of the age of consent for male homosexual sex with the age of heterosexual consent at 16 in 2001, the abolition

of ‘Section 28’ in 2003, and the passing of the Civil Partnership Act in 2004. Indeed, such developments have been slow and tortuous, mainly due to the fierce opposition of those supporting a strictly heteronormative model of intimate life. In this respect, it is important to emphasize that the majority of the policy changes mentioned above took place in the past decade, also thanks to a favourable political environment, and to the supra-national influence of ‘Europe’, and the European Convention of Human Rights.

Another relevant aspect to point out is how, until 2004, married couples were at the top of the hierarchy which underlies the regulation of intimate relationships. In 1998 a Green Paper produced by the Home Office, stated that marriage is still the “surest foundation for raising children and remains the choice for the majority of people in Britain” (Home Office 1998: 4). Indeed, since then, the Civil Partnership Act 2004 has created a legal status for same-sex partners which gives them rights, powers and duties similar to those of married couples. Nevertheless, some believe that the fact that gay marriage was not allowed, was a way of sanctioning the inherent superiority of marriage as a heterosexual institution (Stychin 2006a; 2006b; Wikinson and Kitzinger 2005).

That policies are based on a hierarchy of intimate relationships appeared clear from the table displayed in section 4.3.5 of this chapter which showed that people who are institutionally recognized relationships, i.e. either marriage or civil partnership, are guaranteed far more social and fiscal benefits than couples who ‘only’ co-habit. As explained earlier, reforms are under way to try to guarantee some form of financial relief to cohabitant couples who have children, in case of death or separation. However, this new provision is primarily aimed at protecting children, rather than the cohabitant couple *per se*. This is yet another example suggesting that ‘stable’, dyadic, and institutionally recognized relationships are privileged and better supported by social policies.

Having said this, there are other examples of policies in this chapter which show an *overture* towards an acknowledgement of other, ‘less conventional’ forms of intimate relationships. We have seen, for example, that the definition of next of kin, encompasses not just a blood relative or spouse, but also long-term partners, cohabitantes and even close

friends. And a path-breaking step in the recognition of ‘other’ forms of intimate life has only been recently taken as a result of the debates on the amendment of the Human Fertilisation and Embryology Act in the spring 2008. The change in the Act from the ‘need for a father’ to the ‘need for supportive parenting’ for children conceived by IVF entails an important detachment in policies from a heteronormative model of parenting, and acknowledges that parenthood and intimate lives can be organized very differently from the dyadic unit composed of a male/father and female/mother figure. It is interesting to note that even the most conservative MPs who contributed to the debates on the amendment of the Act contemplated the possibility that the ‘father figure’ in a child’s life may be also be a relative, even a grandfather, thus challenging the more traditional notion of fatherhood.

To conclude, the discussion presented in this chapter suggests that in a favourable political climate, and under the influence of both European regulations and a strong and vocal organized civil society, social policies addressing issues of intimate citizenship are progressively changing in the UK, even opening up to recognizing the diverse ways in which people live their intimate lives.

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<sup>146</sup> NOU's are short form for "Norwegian Official Reports". Norges offentlige utredninger. The government appoint committees and working parties to "utrede" different societal conditions. Such an utredning/evaluation/explanation can be presented either as a NOU or as a report. The committees usually consists of experts, users and bureaucrats. The NOU's are large documents, usually taking years to prepare.

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